TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. 53

THE PEOPLE OF THE STATE OF NEW YORK,
PETITIONER,

vs.

JOSEPH C. O'NEILL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

PETITION FOR CERTIORARI FILED APRIL 21, 1958
CERTIORARI GRANTED JUNE 2, 1958

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN COURT OF GENERAL SESSIONS, COUNTY OF NEW YORK

Criminal 1719

In the Matter

of

the Investigation by the Fourth November 1953 Grand Jury entitled "THE PEOPLE OF THE STATE OF NEW YORK

—against—

JOHN DOE."

CERTIFICATE AND RECOMMENDATION —April 20, 1956 (Filed in Circuit Court of Dade County, State of Florida—April 23, 1956)

Upon reading the annexed affidavit of Francis X. Clark, Assistant District Attorney of the County of New York, sworn to on April 19, 1956, and pursuant to section 618-a of the Code of Criminal Procedure of the State of New York (Chapter 387 of the Laws of 1936),

I, Mitchell D. Schweitzer, Judge of the Court of General Sessions of the County of New York, do hereby Certify,

First: The Court of General Sessions of the County of New York is a court of record of the State of New York.

Second: The District Attorney of New York County has been conducting before the Fourth November 1953 Grand Jury of the County of New York an investigation, bearing the above title, of the disposition of the general funds of certain labor unions and of the activities of officials of said labor unions in the disposition of said funds.

[fol. 2] The said Grand Jury seeks to determine whether certain labor officials and representatives of the aforesaid labor unions have conspired to steal and have stolen property belonging to said unions, in violation of sections 580 and 1290 of the Penal Law of the State of New York.

The said Grand Jury in the conduct of the aforementioned

investigation has heard evidence concerning the disposition of certain general funds of the Distillery, Rectifying, Wine and Allied Workers' International Union of America (A. F. of L.). This evidence covers a seven-year period ending November 15, 1954.

Third: Joseph C. O'Neill is a material and necessary witness in the said Grand Jury investigation.

Joseph C. O'Neill is general president of the Distillery, Rectifying, Wine and Allied Workers' International Union of America (A. F. of L.), chairman of the Executive Board, and chairman of the Social Security Department, i.e., the welfare fund of said union. His testimony is sought by the said Grand Jury on the circumstances relating to the aforementioned disposition of the general funds of the Distillery, Rectifying, Wine and Allied Workers' international (sic) Union of America (A. F. of L.).

The District Attorney's office has made efforts, all without success, to secure the attendance of Joseph C. O'Neill as a witness before the said Grand Jury. Joseph C. O'Neill has consistently refused to appear to testify. His home and office are in Chicago, Illinois. Illinois has no reciprocal witness statute. Therefore, the District Attorney's office has been powerless to compel Joseph C. O'Neill's attendance [fol. 3] by court process.

Information available to the District Attorney of the County of New York establishes the following:

The biennial convention of the Distillery, Rectifying, Wine and Allied Workers' International Union of America (A. F. of L.) is scheduled to be held in Miami, Florida, on April 23, 1956. Arrangements have been made by the union to hold the convention at the Monte Carlo Hotel, in Miami.

Joseph C. O'Neill, as general president of the union, is required by the constitution of the union to conduct the proceedings of the convention.

Arrangements have been made for Joseph C. O'Neill's attendance and presence at the Monte Carlo Hotel, Miami, Florida, on April 23, 1956.

Fourth: The presence of the said Joseph C. O'Neill as a witness before the said Grand Jury will be required for

a period of fifteen days from the date of his arrival in New York County. The said Grand Jury convenes at the Criminal Courts Building, 155 Leonard Street, in the County, City and State of New York.

Fifth: The attendance of the said Joseph C. O'Neill before the said Grand Jury cannot be ensured voluntarily.

Sixth: It will not cause undue hardship to the said Joseph C. O'Neill to attend and testify before the said Grand Jury.

[fol. 4] Seventh: The laws of the State of New York will give to the said Joseph C. O'Neill, while in the State of New York in obedience to an order directing him to attend and testify before the said Grand Jury in New York, protection from arrest and the service of process, civil or criminal, in connection with matters which arose before his entrance into New York under such order.

And I Do Hereby Recommend that the said Joseph C. O'Neill be taken into immediate custody and delivered to an officer of the State of New York to assure his attendance in New York, and that the Court in Florida to which this Certificate and Recommendation will be presented, in lieu of notification of any hearing thereon, direct that such witness be forthwith brought before the said Court for said hearing.

/s/ Mitchell D. Schweitzer, Judge of the Court of General Sessions.

Done and sealed in the Court of General Sessions of the State of New York, County of New York, this 20th day of April, 1956.

[Seal omitted]

[fol. 5]

IN COURT OF GENERAL SESSIONS, COUNTY OF NEW YORK

In the Matter

of

the Investigation by the Fourth November 1953 Grand Jury entitled "THE PEOPLE OF THE STATE OF NEW YORK

—against—

JOHN DOE."

CERTIFICATE RE "COURT OF RECORD" AND TO CLERK'S AUTHORITY—April 20, 1956

I, Mitchell D. Schweitzer, one of the Judges of the Court of General Sessions of the County of New York, do hereby Certify That

First: The said Court is a court of record of the State of New York, having a clerk and seal;

Second: F. Howard Barrett, who has signed the annexed attestation, is the duly constituted and qualified clerk of said Court; said signature is his genuine handwriting; and all his official acts, as said clerk, are entitled to full faith and credit.

And I Further Certify that said attestation is in due form of law.

Witness my hand this 20th day of April, 1956.

/s/ Mitchell D. Schweitzer, Judge of the Court of General Sessions.

[Seal omitted]

[fol. 6]

IN COURT OF GENERAL SESSIONS, COUNTY OF NEW YORK

In the Matter

of

the Investigation by the Fourth November 1953 Grand Jury entitled "THE PEOPLE OF THE STATE OF NEW YORK

—against—

JOHN DOE."

CLERK'S CERTIFICATE—April 20, 1956

State of New York,
County of New York, *ss.*:

I, F. Howard Barrett, Clerk of the Court of General Sessions of the County of New York, do hereby Certify that Honorable Mitchell D. Schweitzer, whose name is subscribed to the preceding certificate, is one of the Judges of the Court of General Sessions of the County of New York, duly commissioned and qualified, and that the signature of said Judge to said certificate is genuine.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court this 20 day of April, 1956.

/s/ F. Howard Barrett, Clerk of the Court of General Sessions.

[Seal omitted]

[fol. 7]

IN COURT OF GENERAL SESSIONS, COUNTY OF NEW YORK

In the Matter

of

the Investigation by the Fourth November 1953 Grand Jury entitled "THE PEOPLE OF THE STATE OF NEW YORK

—against—

JOHN DOE."

AFFIDAVIT OF FRANCIS X. CLARK—April 19, 1956

State of New York,
County of New York, *ss.*:

Francis X. Clark, being duly sworn, deposes and says:

I am an Assistant District Attorney in and for the County of New York, assigned to the Rackets Bureau of the District Attorney's office.

I have been working on the above entitled investigation with Alfred J. Scotti, Chief Assistant District Attorney and Chief of the Rackets Bureau, and am familiar with all the matters developed in the course of said investigation.

The District Attorney of New York County has been conducting before the Fourth November 1953 Grand Jury of the County of New York an investigation, bearing the above title, of the disposition of the general funds of certain labor unions and of the activities of officials of said labor unions in the disposition of said funds.

[fol. 8] The said Grand Jury seeks to determine whether certain labor officials and representatives of the aforesaid labor unions have conspired to steal and have stolen property belonging to said unions, in violation of sections 580 and 1290 of the Penal Law of the State of New York.

The said Grand Jury in the conduct of the aforementioned investigation has heard evidence concerning the disposition of certain general funds of the Distillery, Rectifying, Wine and Allied Workers' International Union of America, (A. F. of L.). This evidence covers a seven-year period ending November 15, 1954.

Joseph C. O'Neill is general president of the Distillery, Rectifying, Wine and Allied Workers' International Union of America (A. F. of L.), chairman of the Executive Board, and chairman of the Social Security Department, i.e., the welfare fund of said union. His testimony is sought by the said Grand Jury on the circumstances relating to the aforementioned disposition of the general funds of the Distillery, Rectifying, Wine and Allied Workers' International Union of America (A. F. of L.).

In view of the foregoing, it is respectfully submitted that the said Joseph C. O'Neill is a material and necessary witness in the said Grand Jury investigation.

The District Attorney's office has made efforts, all without success, to secure the attendance of Joseph C. O'Neill as a witness before the said Grand Jury. Joseph C. O'Neill has consistently refused to appear to testify. His home and office are in Chicago, Illinois, Illinois has no reciprocal [fol. 9] witness statute. Therefore, the District Attorney's office has been powerless to compel Joseph C. O'Neill's attendance by court process.

Information available to the District Attorney of the County of New York establishes the following:

The biennial convention of the Distillery, Rectifying, Wine and Allied Workers' International Union of America (A. F. of L.) is scheduled to be held in Miami, Florida, on April 23, 1956. Arrangements have been made by the union to hold the convention at the Monte Carlo Hotel, in Miami. Joseph C. O'Neill, as general president of the union, is required by the constitution of the union to conduct the proceedings of the convention.

Arrangements have been made for Joseph C. O'Neill's attendance and presence at the Monte Carlo Hotel, Miami, Florida, on April 23, 1956.

The presence of the said Joseph C. O'Neill as a witness before the said Grand Jury will be required for a period of

fifteen days from the date of his arrival in New York County. The said Grand Jury convenes at the Criminal Courts Building, 155 Leonard Street, in the County, City and State of New York.

The attendance of the said Joseph C. O'Neill before the said Grand Jury cannot be ensured voluntarily.

It will not cause undue hardship to the said Joseph C. O'Neill to attend and testify before the said Grand Jury. [fol. 10] I, therefore, respectfully request that this Court, pursuant to Section 618-a of the Code of Criminal Procedure of the State of New York (Chapter 387 of the Laws of 1936), issue a certificate under the seal of this Court certifying to the courts of the State of Florida that the said Joseph C. O'Neill is a material and necessary witness in the said Grand Jury investigation and that he will be required to attend and testify before the said Grand Jury for a period of fifteen days from the date of his arrival in New York County, at the Criminal Courts Building, 155 Leonard Street, in the County, City and State of New York.

I further respectfully request that the certificate applied for herein upon issuance be authorization to me to reveal the subject of the said investigation to the extent set forth herein.

I further request that the Court recommend that the said Joseph C. O'Neill be taken into immediate custody in Florida and delivered to an officer of the State of New York to assure his attendance in this State, and request further that the Court recommend that in lieu of notification of any hearing on the certificate of this Court the Court in Florida direct that such witness be forthwith brought before the Court for said hearing. I make this request because the said Joseph C. O'Neill has resisted all efforts to persuade him to attend in New York before the said Grand Jury. He has no permanent residence in Florida, will remain in Florida only a few days and, I am informed, will return to the State of Illinois, which state does not make provisions for commanding persons within its borders to attend and testify in a sister state.

[fol. 11] No previous application for this or a similar certificate and recommendation has been made.

/s/ Francis X. Clark

Sworn to before me this 19th day of April, 1956.

/s/ Frank J. Goss

(Frank J. Goss, Notary Public for the State of New York, Qualified in Queens County, No. 41-6605900, Certificate filed with New York County Clerk, Commission expires March 30, 1958.)

[fol. 13] [File endorsement omitted]

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA

Criminal 1719

In the Matter

of

the Application of the People of the State of New York for an Order Requiring One

JOSEPH C. O'NEILL

to attend and testify before the Grand Jury of the County of New York, State of New York.

ATTACHMENT AND RETURN—Filed April 23, 1956

To: The Sheriff of Dade County, Florida

Whereas, there has been presented to me as a Judge of the Circuit Court of the Eleventh Judicial Circuit, Dade County, State of Florida, a court of record, a certificate dated April 20, 1956, of the Honorable Mitchell D. Schweitzer, Judge of the Court of General Sessions of the County of New York, a court of record of the State of New York, certifying that there is now pending in that court a criminal

investigation by the Fourth November, 1953 Grand Jury of the County of New York, entitled "The People of the State of New York v. John Doe"; that a certain Joseph C. O'Neill, now within the County of Dade, State of Florida, is a necessary and material witness for said State of New York in the Criminal Proceeding being conducted by the said Grand Jury; that the presence as a witness of said Joseph C. O'Neill will be required before the said Grand Jury at the Criminal Courts Building, 155 Leonard Street, County, City and State of New York, for a period of fifteen days from the date of his arrival in New York City; and recommending that said Joseph C. O'Neill be taken into [fol. 14] immediate custody and delivered to an officer of the State of New York to assure his attendance in New York.

It Is Hereby Ordered, that you attach Joseph C. O'Neill and bring him forthwith before me to show cause why an order of this Court should not issue to take him into immediate custody and deliver him to an officer of the State of New York to assure his attendance in New York.

Entered as an order of this Court this 23 day of April, 1956.

/s/ George E. Holt, Circuit Judge.

[fol. 15] [File endorsement omitted]

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA

Criminal No. 1719

[Title omitted]

ORDER TO SHOW CAUSE AND RELEASING O'NEILL ON BAIL—April 23, 1956

This Cause having this day come on to be heard upon the Rule to Show Cause why the respondent Joseph C. O'Neill should not be returned in the custody of officers of the State of New York, to be returned to the State of New York, for the purpose of appearing before the November, 1953 Grand

Jury of the County of New York, and the said respondent having appeared in open court in person, and S. G. Lippman, Attorney of the Bar of Illinois and District of Columbia, having appeared in company with the respondent Joseph C. O'Neill, and it being represented to the Court by said attorney that the said respondent Joseph C. O'Neill is presently within the jurisdiction of this Court, presiding at the convention of Distillery Rectifying Wine and Allied Workers of America, A.F. of L. and C.I.O., presently in session at the Monte Carlo Hotel on Miami Beach, Florida, and having requested the Court for the opportunity to review the subject matter upon which the Rule to Show Cause is based, and for an opportunity to file a response to said Rule, and the Court being fully advised in the premises, upon consideration thereof, it is

[fol. 16] Ordered and Adjudged that the respondent Joseph C. O'Neill file his response to the Rule to Show Cause within twenty (20) days from the date hereof, and that said cause should be continued until the 15 day of May, A.D., 1956. It is further

Ordered and Adjudged that the respondent Joseph C. O'Neill be and he is hereby released from the custody of the Sheriff of Dade County, upon his giving good and sufficient bond with proper sureties in accordance with the law, returnable to this Court, in the amount of $2,500. It is further

Ordered, Adjudged and Decreed that this Court retain jurisdiction over the persons hereto, and the subject matter hereof until further order of this Court.

Done and Ordered in Chambers, this 23 day of April, A.D., 1956.

/s/ George E. Holt, Circuit Judge.

[fol. 17] CLERK'S NOTE RE BOND

Appearance Bond made by Joseph C. O'Neill as Principal and Capitol Indemnity Insurance Company as Surety to the Governor of the State of Florida in the sum of $2500.00; said Bond was filed in his office on April 24, 1956 and is retained by his office.

[fol. 18] [File endorsement omitted]

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY, FLORIDA

Criminal No. 1719

[Title omitted]

MOTION TO EXTEND TIME TO FILE RESPONSE TO RULE TO SHOW CAUSE—Filed May 8, 1956

Comes now Joseph C. O'Neill, by his undersigned attorney and respectfully shows unto the Court that the undersigned has been retained as counsel for said Joseph C. O'Neill and that the legal questions arising in connection with said application and the Rule to Show Cause issued therein is a difficult question requiring more than an ordinary amount of research, and by the Order to Show Cause Joseph C. O'Neill is required to file a response to said Motion within 20 days, which is by May 13, 1956, and said cause is set for hearing on May 15, 1956.

Wherefore: He prays that the Court enter an Order extending and enlarging the time for filing his response for an additional period of 15 days from said May 13, 1956, and extend the time for hearing to a suitable date after the filing of such response.

/s/ L. J. Cushman, Attorney for Joseph C. O'Neill.

[fol. 19] [File endorsement omitted]

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY, FLORIDA

Criminal No. 1719

[Title omitted]

ORDER EXTENDING TIME TO FILE RESPONSE TO RULE TO SHOW CAUSE—May 8, 1956

Upon Motion of Joseph C. O'Neill, it is

Ordered that said Joseph C. O'Neill be and he is hereby allowed until the 28 day of May, 1956, within which to file

his response to the Rule to Show Cause in the above entitled matter and said cause is set for further hearing on the 18 day of June, 1956, at 2:30 P.M. for further hearing.

Done and Ordered in the City of Miami, Dade County, Florida, this 8 day of May, 1956.

/s/ George E. Holt, Circuit Judge.

[fol. 20] [File endorsement omitted]

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

Criminal No. 1719

[Title omitted]

RESPONSE TO RULE TO SHOW CAUSE AND MOTION TO QUASH—
Filed May 28, 1956

Respondent, Joseph C. O'Neill, whose correct name is Joseph O'Neill, for his response to the Rule to Show Cause heretofore issued, and directed to him in the above entitled matter, dated April 23, 1956, says:

First: That Chapter 942 Florida Statutes 1955, and particularly Sections 942.01 to 942.06 Florida Statutes, entitled the "Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings" and each and every section thereof, separately and severally, and Section 618-a, of the Code of Criminal Procedure of the State of New York, and each and every section thereof, are unconstitutional, and null and void, because:

(1) Each of said Acts and each and every section thereof, separately and severally, is in contravention of, and violates the Fourth Amendment to the Constitution of the United States and Section 22 of the Declaration of Rights of the Constitution of Florida, in that same denies to respondent, Joseph C. O'Neill, the right to be secure in his person against unreasonable seizure, and permits and authorizes the issuance of a warrant or order for his

seizure, arrest and imprisonment without probable cause, and without requiring any showing of probable cause by indictment, information, affidavit or otherwise that he is or has been guilty of any crime or offense against the laws of Florida, the laws of New York or the laws of any other state or territory.

[fol. 21] (2) That each of said Acts, and each and every section thereof, separately and severally, is in contravention of and violates the Fifth Amendment to the Constitution of the United States and Section 12 of the Declaration of Rights of the Constitution of Florida, in that the above entitled proceedings thereunder deprive Respondent of his liberty without due process of law.

(3) That each of said Acts, and each and every section thereof, separately and severally, is in contravention of and violates the Sixth Amendment to the Constitution of the United States and Section 11 of the Declaration of Rights of the Constitution of Florida.

(4) That each of said Acts, and each and every section thereof, separately and severally, is in contravention of and violates the Eighth Amendment to the Constitution of the United States and Section 9 of the Declaration of Rights of the Constitution of Florida, in that same does not provide for bail.

(5) That each of said Acts, and each and every section thereof, separately and severally, is in contravention of and violates Article Four, Section 2, and the Fourteenth Amendment to the Constitution of the United States in that same abridges the privileges and immunities of Citizens of the United States, and deprives respondent of his liberty without due process of law and denies respondent the equal protection of the laws.

(6) That each of said Acts, and each and every section thereof, separately and severally, is too vague, general and indefinite that same sets forth no rule or standard by which the Circuit Court of Dade County, Florida, or any other Court of Record can determine whether respondent is a material and necessary witness before said Grand

Jury, nor whether it will or will not cause respondent undue hardship to be compelled to attend and testify before said Grand Jury, and that said lack of any established or fixed rule of law by which to ascertain said facts de-
[fol. 22] prives respondent of his liberty without due process of law, and without any right or opportunity to make any defense to the application for his arrest or seizure, in contravention of and in violation of the Constitution of the United States, and the Constitution of Florida.

(7) That sub-section (2) of Section 942.02 Florida Statutes ~~1955~~, is in contravention of and violates the Sixth Amendment to the Constitution of the United States and Section 11 of the Declaration of Rights of the Constitution of Florida, and the Fifth and Fourteenth Amendments to the Constitution of the United States, in making or attempting to make the Certificate of the Judge prescribed in sub-section (1) of said Section 942.02 Florida Statutes 1955 evidence against respondent upon the hearing.

(8) Said Acts, and each of them, and every section thereof, separately and severally, constitutes an Agreement or Compact between two or more states, or an attempt to enter into such Compact, in contravention and violation of Section 10 of Article I of the Constitution of the United States, without the consent of Congress.

Second: That he is a citizen, and resident of the State of Illinois, having his home and domicile in Elmwood Park, a suburb of the City of Chicago, Cook County, Illinois, and has never been a citizen nor resident of the State of Florida, nor a citizen nor resident of the State of New York, and that on or about April 23, 1956, he came to the State of Florida for a temporary sojourn of a few days to attend a convention of Distillery, Rectifying, Wine and Allied Workers' International Union of America, A. F. of L. and C. I. O., which was in session on said date at the Monte Carlo Hotel, in the City of Miami Beach, Dade County, Florida, intending to remain in the State of Florida only during the time said convention was in session, and intending upon the adjournment thereof to

return to his home and place of domicile and residence in the State of Illinois.

[fol. 23] Third: That he is not guilty and has never been guilty of any violation of Sections 580 and 1290 of the Penal Laws of the State of New York, nor any other statute, rule, regulation or law of the State of New York or the State of Florida, and he says that none of the monies or funds of said Distillery, Rectifying, Wine and Allied Workers' International Union of America, A. F. of L. and C. I. O. are kept or deposited in the State of New York, and that none of said monies or funds have been kept or deposited in said State of New York, and that none of said monies or funds were stolen, and none of said monies or funds could have been stolen in the State of New York, because same were not, and never have been kept or deposited in said State at any time, including but not limited to said seven-year period ending November 15, 1954, and respondent denies that any offense against or violation of said Sections 580 and 1290 of the Penal Law of New York were committed by respondent, or any other officer, agent or employee of said Union at any time, including but not limited to said seven-year period ending November 15, 1954, and respondent says that he, Joseph C. O'Neill, is not now, and never has been charged in or by any indictment or information filed in any proceeding in any Court of the State of New York, with any offense against nor violation of Section 580 and 1290 of the Penal Law of New York, nor any other section of said Penal Law, nor any other statute, rule, regulation or law of New York, and he has never been charged by any Affidavit, or by any other proceedings in any Court of New York with any offense against or violation of said Sections of the Penal Law of New York or any other statute, rule, regulation or law of said State of New York, and no criminal charge or proceeding is pending against him in New York, and no such criminal proceeding has ever been pending against him in said State of New York.

Fourth: That he is not now charged, and never has been charged with any violation of any statute, rule, regu-

lation or law of the State of Florida, and no criminal charge [fol. 24] or proceeding is now pending against him in any Court of the State of Florida, and he is not now and never has labored under prosecution for any such offense or violation of any statute, rule, regulation or law of the State of Florida.

Fifth: That the affidavit of Francis X. Clark, an Assistant District Attorney in and for the County of New York, and State of New York, and the Certificate of the Judge based thereon, is insufficient in law to comply with the requirements of the Fourth Amendment to the Constitution of the United States and Section 22 of the Declaration of Rights of the Constitution of Florida, in that same fails to set forth any facts, showing what testimony, if any, is sought of or from respondent, and fails to set forth any facts which show or disclose that any testimony sought or expected of respondent is material and necessary in that: (1) Neither said affidavit nor the Certificate of the Court shows that there are no competent witnesses within the State of New York who can testify to the same matters or facts, if any, which are sought from respondent; (2) That in fact there are competent witnesses concerning said alleged matters present in the State of New York; (3) Same does not set forth any facts sufficiently designating or identifying the supposed subject or matter being investigated by said Grand Jury to enable the Circuit Court of Dade County, Florida, or any other Court of Record to ascertain or determine whether any testimony sought or expected of or from respondent is relevant, material or necessary to said alleged inquiry; (4) Same does not set forth distinctly what testimony is sought or expected of or from respondent so that the Circuit Court of Dade County, Florida, or any other Court of Record can ascertain or determine whether such testimony is or would be material or necessary to said inquiry.

Sixth: That it is not shown, and has not been made to appear either by the affidavit of Francis X. Clark, an Assistant District Attorney in and for the County and [fol. 25] State of New York, nor from the Certificate of the

Judge based thereon, that the laws of the State of New York, and the laws of each and every other state through which respondent may be required to pass by ordinary course of travel from Florida to New York will give respondent protection from arrest and the service of Civil and Criminal process, and no facts have been presented or shown that respondent will be afforded such protection as required by sub-section (2) of Section 942.02 Florida Statutes 1955, and respondent denies that any such protection has been or can be given him.

Seventh: That respondent is a citizen of and is domiciled in the State of Illinois, and he respectfully avers that it will cause him undue hardship to be compelled to go to the State of New York to testify before said Grand Jury, in that he will be compelled to leave his home, his family and business affairs for an undetermined time, and he has reason to believe, and does believe that if he should be ordered to proceed to the State of New York to testify before said Grand Jury, that he will be compelled to go in the custody of an officer of the State of New York as a common criminal and be imprisoned, confined and restrained of his liberty as a common criminal while in the State of New York, and he specifically denies that he will be caused no undue hardship.

Wherefore, respondent, Joseph C. O'Neill, prays for the causes and reasons aforesaid, that said Rule to Show Cause be Quashed, and discharged, and that the prayer or recommendation of said Certificate upon which same was based and issued be denied.

/s/ L. J. Cushman, Attorney for Joseph C. O'Neill,
601 Ainsley Building, Miami (32), Florida.

[fol. 26] Certificate of Mailing (omitted in printing).

[fol. 27]

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY FLORIDA

Case No. 1719

[Title omitted]

ORDER CONTINUING BAIL—June 18, 1956

The above-styled cause coming on this day to be heard upon the certifucate (sic) of the State of New York, and the Response, and motion to quash filed by and on behalf of said Joseph O'Neill, and said Joseph O'Neill being personally present, and represented by counsel, and the Court having heard the arguments of counsel for the parties, and counsel for the State of New York having requested until Friday, June 22, 1956 within which to file a memorandum in support of said application and certificate, no decision or order having been made thereon, it is Considered, Ordered and Adjudged that said Joseph O'Neill be and he is hereby released upon the same bond as heretofore posted, until the further order of the Court.

Done and Ordered in the City of Miami, Dade County, Florida, this 18th day of June, 1956.

/s/ George E. Holt, Circuit Judge.

We Consent: /s/ Francis X. Clark, A. D. Atty, for the State of New York, County of New York.

/s/ L. J. Cushman, /s/ S. G. Lippman, for Joseph O'Neill.

[File endorsement omitted]

[fol. 123-A] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 124]

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY

Criminal No. 1719

In the Matter of

The Application of the People of the State of New York for an Order Requiring One

JOSEPH C. O'NEILL

to attend and testify before the Grand Jury of the County of New York, State of New York.

OPINION AND ORDER—July 20, 1956

HOLT, Circuit Judge:

This is an application by the People of the State of New York for an Order requiring Joseph C. O'Neill to attend and testify before the Grand Jury of New York County, New York, pursuant to Chapter 942, Fla. Statutes 1955, the "Uniform Law to Secure the Attendance of Witnesses from within or without a State in Criminal Proceedings", which, for the sake of brevity, will hereafter be referred to as "The Uniform Law", which was adopted in this state in 1941. On April 23, 1956, an Assistant District Attorney in and for New York County, New York, filed in the above entitled cause a Certificate of a Judge of the Court of General Sessions of the County of New York, supported by an affidavit of an Assistant District Attorney of said County, certifying that there was then pending in said court a criminal investigation by the Fourth November 1953 Grand Jury of said County entitled "The People of the State of New York v. John Doe", and that a certain Joseph C. O'Neill, then within Dade County, Florida, was a necessary and material witness for the State of New York in said criminal proceeding being conducted by said Grand Jury, and requesting that said Joseph C. O'Neill be taken into immediate custody and delivered to an officer

of the State of New York to be conveyed to New York in order to assure his attendance as a witness before said Grand Jury. Upon presentation of said Certificate, this Court issued an attachment for said Joseph C. O'Neill, [fol. 125] and a rule directed to him to show cause why an Order should not issue to take him into immediate custody and deliver him to an officer of the State of New York to assure his attendance in New York.

Joseph C. O'Neill was forthwith seized and arrested upon said Attachment and Rule to Show Cause, and brought before this Court in custody, and through his attorney, he requested time to review said matter upon which said Attachment and Rule to Show Cause was based, and to file a response to said Rule to Show Cause. This Court fixed bail at $2500.00, and allowed him time within which to file his response to said Rule to Show Cause. Thereafter, said Joseph C. O'Neill filed his response to said Rule to Show Cause and Motion to Quash, and this matter or cause came on to be heard on June 18, 1956, upon said Certificate of said Judge of the Court of General Sessions of New York County, New York, and said Rule to Show Cause issued thereon, and the response, and Motion to Quash same filed by, and on behalf of said Joseph C. O'Neill, who appeared in person and by counsel, the applicant being represented by Honorable Francis X. Clark, an Assistant District Attorney in and for the County of New York, assigned to the Rackets Bureau of the District Attorney's Office.

By his response to said Rule to Show Cause, said Joseph C. O'Neill objected to the entry of any Order that he be taken into immediate custody, or that he be delivered to an officer of the State of New York, upon the ground that said "Uniform Law", Sections 942.01 to 942.06 Fla. Statutes 1955) was unconstitutional and void, in that same was in contravention of certain provisions of the Constitution of the United States, and the Constitution of Florida, and that no sufficient showing had been made that he was or is a necessary, and material witness in said criminal proceeding, and other reasons, which will be noted hereinafter. Said matter was fully argued by counsel for the respective parties, and the argument was reported, transcribed, and

[fol. 126] submitted to the Court, together with briefs by counsel for the respective parties, all of which have been fully considered by the Court.

The "Uniform Law", first adopted by the National Conference of Commissioners on Uniform State Laws, in 1931, (See Note: 24 FSA 288), in point of fact is "Uniform" in name only, and in its general over-all outline, because almost every state which has adopted it, has made changes in its text. Although 25 years have elapsed since it was first proposed for adoption by the States and although it has been adopted in somewhat different form by 42 States and the Territory of Puerto Rico (See: 9 U.L.A. Supp. 33), there appear to be only eleven (11) reported decisions, listed in the Appendix to this Opinion, in which it has been considered, construed, or passed upon in any way; and none of those eleven decisions has considered or passed upon Sub-Section (3) of Section 942.02 Fla. Statutes, which is sought to be invoked in this proceeding.

The "Uniform Law" (Sections 942.01 to 942.06 Fla. Stat. 1955) appears to provide for two methods by which a witness may be compelled to appear and testify as a witness in another State. *First,* by the issuance of a "summons * * * directing the witness to attend and testify in the Court" of the other State, as provided in Sub-Section (2) of Section 942.02; in other words, by the issuance of a witness subpoena by a court of record of this State, directed to the witness, requiring him to go to another State, and appear and testify in the Court of such other State. *Second,* by the issuance or entry of an Order, provided by Sub-Section (3) of Sec. 942.02, that the witness be taken into immediate custody and delivered to an officer of the requesting State to be taken as a prisoner to the State where his attendance is desired as a witness. The Certificate which is the basis for this application, seeks to invoke the second method; that is, it recommends the immediate seizure of O'Neill, and his immediate delivery to officers of the State of New York.

The briefs filed by counsel for the Applicant and counsel for the Respondent, have not cited a single reported case in which any Court has considered or passed upon the con-
[fol. 127] stitutionality of the particular sub-section of the

"Uniform Law" (Sub-Section (3) of Sec. 942.02 Fla. Statutes), except *In Re Allen* (a) 1940, 49 Pa. D. & C. 631, in which the Court, after fully considering the constitutionality of the Act, held it unconstitutional, and expressly held (Text 642-644) that the Section attempting to provide for the immediate seizure of the witness and his immediate delivery to officers of the requesting State, is unconstitutional. The only other reported decision which refers to that particular Sub-Section of the Act is *U. S.* vs. *Monjar* (Del. 1946), 154 F. 2d 954, 170 A.L.R. 327, in which the Court merely refers to said Sub-Section, and holds that it should not be invoked against the Clerk of the United States District Court for the District of Delaware.

There appear to be only three reported decisions which have considered the constitutionality of the "Uniform Law", two in New Jersey, and one in Pennsylvania. *In Re Allen, supra,* decided in 1940, is the earliest of the three decisions, and in a well considered, well supported decision, the court held said Act unconstitutional because: (1) It violates the Fourteenth Amendment to the Constitution of the United States, which forbids any State to make or enforce any law which abridges the privileges and immunities of citizens of the United States; (2) violates the clause in the Fourteenth Amendment to the Constitution of the United States, which provides that no State shall deprive any person of life, liberty, or property, without due process of law; and (3) violates the Constitutional guaranty that the people shall be secure in their persons from unreasonable searches and seizures. *In Re Cooper,* 127 N.J.L. 312, 22 A. 2d. 532, decided in 1941, is the next case in which the constitutionality of said Act was considered, but the question does not appear to have been fully presented; nor does it appear to have been fully considered or decided, and in that case, the provision authorizing the immediate seizure of the witness, and his immediate delivery to the officers of the requesting State (Sub-section (3) Sec. 942.02 Fla. Statutes) was not involved or considered. The third case, *In Re Saperstein,* 30 N. J. Super. 373, 104 A. 2d. 842, cert. den. 75 S.Ct. 110, 348 US 874, 99 L. Ed. 688, decided in 1954, primarily dealt with the question whether the "summons" [fol. 128] or subpoena provided for by the Act (Sub-Section

(2) Sec. 942.02 Fla. Statutes) authorized a subpoena duces tecum, and the provision relied upon in the case before the Court, Sub-Section (3), Sec. 942.02 Fla. Statutes, was not involved. The only point considered, so far as constitutionality of the Act was concerned, was whether it constituted a "compact" between states, in violation of the third clause of Section 10, Article I, of the Constitution of the United States, and the Court held that it did not constitute such a "compact". Thus, in the only three cases in which the constitutionality of the "uniform Law" has been considered, it has been held unconstitutional in one, and in the other two, its constitutionality does not appear to have been carefully or thoroughly argued, considered, or decided, but, in the only case (*In Re Allen, supra*) in which the constitutionality of Sub-Section (3) of Sec. 942.04, Fla. Statutes, has been considered, it was held unconstitutional. In view of the fact that the constitutionality of the "Uniform Law" has been considered in only three cases during the 25 years which have passed since it was first proposed, and by the courts of only two out of the 42 States which have enacted said law (i.e., Pennsylvania and New Jersey), it can hardly be said that its constitutionality is settled. Two other cases have been cited, bearing upon the constitutionality of the Act under consideration: *In Re Commonwealth of Pennsylvania,* 90 N.Y.S. 808, decided in 1904, and *Commonwealth of Massachusetts* v. *Klaus,* 145 App. Div. 798, 130 N. Y. S. 713, decided in 1911. The "Uniform Law" was adopted by the National Commissioners on Uniform State Laws in 1931, twenty years *after* the decision in the *Klaus* case, and twenty-seven years after the decision of the case in 90 NYS 808, both of which involved Section 618-a of the New York Code of Criminal Procedure, undoubtedly a forerunner of the "Uniform Law", but which did not contain any provision similar to sub-section (3) of Sec. 942.02 Fla. Statutes. It is also worthy of note that neither of those cases was decided by the highest court of the State of New York, and in the first (*In re Commonwealth of Pennsylvania,* 90 N.Y.S. 808), the Court held [fol. 129] said Act to be unconstitutional, while in the second (*Commonwealth* v. *Klaus,* 130 N.Y.S. 713), said Act was held constitutional by a divided court, with a well-con-

sidered, vigorous dissent. In conclusion, it may be said that the constitutionality of the "Uniform Law" (Sections 942.01 to 942.06 Fla. Statutes) is not settled, but appears to be in grave doubt.

In considering this case, it must be borne in mind that Joseph O'Neill is not under indictment in the State of New York, and it is not contended that he is a fugitive from justice so as to make him subject to extradition pursuant to the Uniform Interstate Extradition Law, Sections 941.01 to 941.37 Fla. Statutes 1955, or under the Federal Criminal Extradition Statute (Sections 3181 to 3195, Title 18 U.S.C.A.) expressly authorized by Section 2 of Article IV of the Constitution of the United States. It appears without question in this case that Joseph O'Neill is a citizen of Illinois, and that he resides, and has his home, and office or place of business in that state. He came into the State of Florida on or about April 23, 1956 for a few days' sojourn in connection with a convention which he was attending. He is not charged with having violated any law of the State of New York, or the State of Florida, or any other State.

It is settled beyond controversy or debate that the Courts of Florida have no jurisdiction to issue process running beyond the territorial limits of this State, and have no jurisdiction over persons, or property beyond the territorial limits of the State of Florida. "A court created within a sovereignty is necessarily limited as to its sphere of direct action on persons and things, real estate and chattels within that sovereignty." *Hotchkiss* vs. *Martin* (Fla.), 52 So. 2d. 113. Process of one State has no force or validity within the territorial limits of another State, and cannot run beyond the territorial limits of the State. *Passet* v. *Chase,* 91 Fla. 522, 107 So. 689. A court created within and for a particular territory is limited in its jurisdiction to such territory, and no judicial process has any force outside such limits. *Phillips* v. *State,* 75 Fla. 93, 77 So. 673. "A warrant of arrest issued in one State may not be exe-
[fol. 130] cuted in another State, for it has no validity beyond the boundaries of the State by whose authority it was issued." *3 Fla. Jur. Arrest, p. 55.* It has been settled ever since *Pennoyer* v. *Neff,* 95 US 714, 24 L. Ed. 565, that

the Legislature of a State cannot authorize process running beyond the territorial limits of the State. Under the authorities cited, it is clear that the Legislature of this State has no constitutional power to confer jurisdiction upon the Courts of this State to issue process running beyond the territorial limits of the State of Florida, and that is the effect of sub-section 1 of Section 942.02 Fla. Statutes 1955. Just as the Legislature of this State is powerless to confer jurisdiction upon this Court to issue witness subpoenae or other process running into Georgia, Alabama, or any neighboring State, it is likewise powerless to confer jurisdiction upon this Court to issue witness subpoenae or other process running into other States, such as New York. If a witness subpoena were issued by this Court commanding a witness to appear before a court of the State of New York, such process would be of no force and effect as compulsory process. Insofar as Sub-section 1 of Section 942.02, Fla. Statutes, 1955, attempts to confer any such power, authority, or jurisdiction upon any court of record of this State, it is unconstitutional, void, and of no effect. Passing for the moment, the fact that the Legislature of this State is powerless to confer upon this, or any other Court of the State of Florida, jurisdiction to issue process running beyond the limits of the State, Section 942.02 Fla. Statutes 1955 also violates the Fourteenth Amendment to the Constitution of the United States in that it abridges the privileges and immunities of citizens of the several states, since it impairs the right of free ingress and egress from state to state, which is one of the rights of national citizenship guaranteed by the Fourteenth Amendment to the Constitution of the United States. *Edwards* v. *California,* 314 US 160; 62 S. Ct. 164; *In Re Allen, supra; Commonwealth* v. *Klaus, supra,* and *Commonwealth* v. *Pennsylvania, supra.*

[fol. 131] Perhaps the most serious objection to the constitutionality of the "Uniform Law" (Sections 942.01 to 942.04 Fla. Statutes) is found in the provisions of Sub-Section (3) of Sec. 942.02, which attempts to authorize a court of this State to order a citizen not charged with the commission of any crime, or even suspected of having committed any crime, to "be taken into immediate custody

and delivered to an officer of the requesting State", or, "in lieu of issuing subpoena or summons, order that such witness be forthwith taken into custody and delivered to an officer of the requesting State." This sub-section makes no provision for bail, and if followed literally, does not contemplate or permit bail, but attempts to authorize any court of record to order a citizen to be arrested, seized and held without bail, and to be delivered, without bail, to an officer of the requesting State to be carried away against his will as a prisoner to another State. Neither counsel has cited any reported case holding this sub-section of the Act under consideration constitutional. This Section was merely mentioned in passing in *U. S.* v. *Monjor* (Del. 1946), 154 F. 2d 954, 170 ALR 327, with the observation that should a subpoena be issued to the Clerk of the United States Court for the District of Delaware, he should not be subjected to the provisions of that Section. In the case of *In Re*: *Allen, supra,* the Court held that the failure of this Section to provide for bail rendered the Act unconstitutional. The Court, in discussing this subject (Text 643-644), said:

> "The Statute under consideration with its provisions for taking a witness into custody and delivering him bodily over to authorities from a foreign jurisdiction is, in our opinion, clearly unreasonable and unwarranted. A person charged with a crime can be taken from one State to another in order that he may be punished for the crime. It is significant that the clause in the Federal Constitution which reads as follows: "A person charged in any State with Treason, Felony, or other crime, who shall flee from Justice, and be found in another State, shall on Demand of the Executive Authority of the State from which he fled, be delivered up to be removed to the State having Jurisdiction of the Crime"; is part of Section 2 of Article IV of the Federal Constitution, and it immediately follows and thus qualifies the opening sentence of that section which guarantees to the citizens of each State all the privileges and immunities of citizens in the several States."

[fol. 132] "The authority for extradition is found in the Federal Constitution and the Federal Statutes

passed pursuant thereto. See R. S. par. 5278, 18 U. S. C. Par. 662. Roberts v. Reilly, 116 U. S. 80 94 (1885), and Innes v. Tobin, 240 U. S. 127, 131 (1916). It would seem that if it required a provision of the Federal Constitution to provide for the compulsory transfer of a person charged with a crime from one State to another, a fortiori, an Act for the compulsory transfer of an innocent person from one State to another for the purpose of giving viva voce testimony should have like express constitutional authority, and that the Act should permit the proposed witness to enter his recognizance as in extradition proceedings. A fugitive from justice or a person in this State charged with a crime in another State is allowed to enter bail unless the crime with which he is charged is punishable by death or life imprisonment; Act of April 2, 1927, P. L. 327, Sec. 16. Surely, it is not due process of law to protect the liberty of criminals and fugitives from justice to a greater degree than the liberty of honest and law-abiding citizens of this State."

The right to bail in Florida is not a mere "privilege", which may be denied in the Court's discretion. The right to bail is absolute, unless the person is charged with a capital offense, and even then, he is entitled to bail unless the proof of guilt is evident or the presumption great. *Ex Parte McDaniel,* 86 Fla. 145, 97 So. 317; *Bozovichar* v. *States,* Ind.) 103 N. E. 2d 680; Section 9, Declaration of Rights of the Constitution of Florida. The right to bail under the Constitution of the United States, and other States is almost universal and unrestricted, except in capital cases where the proof of the prisoner's guilt is evident or the presumption of his guilt is great. See: Sec. 5, Bill of Rights of the Constitution of New York: Eighth Amendment to the Constitution of the United States. "A denial of such right is a deprivation of liberty without due process of law." 3 Fla. Jur. Bail and Recognizance, p. 37-38.

Sub-section 3 of Section 942.02 Fla. Statutes, invoked by the applicant in this case, is clearly unconstitutional and void, and the application for an order to take Joseph O'Neill into immediate custody must be and is hereby denied.

[fol. 133] Sub-Section 2 of Section 942.02 Fla. Statutes requires that this Court determine that the witness is "material and necessary." Neither the Certificate, nor the affidavit upon which it is based, set forth any *facts* from which this Court can determine that O'Neill is a "material and necessary" witness before the Grand Jury, and the showing made in that respect is no stronger than the showing made in the *Application of Stamler*, (NY 1952) 279 App. Div. 908, 111 NYS 2d. 313, in which the State of New Jersey sought a subpoena order to require Frank Costello to appear and testify as a witness in a criminal proceeding in that State. In that case, the Court said:

> "Section 618-a of the New York Code of Criminal Procedure contemplates, at the very least, that the Court of the demanding State shall have passed on the question whether the testimony will be material in the prosecution pending in that State. Whether a mere statement that the witness is a material witness would be sufficient without further recital of the charge and the facts upon which the finding of materiality was based, we do not need now to pass upon. At least upon the certificate produced in this case it was improper for the Judge of the Court of General Sessions to grant the subpoena-order without any proof of the materiality of the testimony of the Order."

In *State* v. *Blount* (Ore. 1954) 200 Ore. 35, 264 P. 2d. 419, cert. den. 74 S. Ct. 711, 347, U. S. 962, 98 L.Ed. 1105, the Oregon Court held that the showing of the facts required by the "Uniform Law" to show that the witness is "material and necessary", should at least be as great as the showing required in order to obtain a continuance upon the ground of the absence of a material witness, and that it must appear from a statement of the *facts* that such witness is "material and necessary", and that a mere statement to that effect is insufficient. In *State* v. *Foquette* (Nevada 1950) 67 Nev. 505, 221 P. 2d. 404, cert. den. 71 S. Ct. 799, 341 US 932, 95 L. Ed. 1361; 72 S. Ct. 369, 342 US 928, 96 L.Ed. 691, the Court again held that under the Act in question the facts must be stated to show that such a wit-

ness is both material and necessary. It is well settled in Florida that in order to secure a continuance upon the ground of the absence of a material witness, the applicant [fol. 134] must state the *facts* to which such witness would testify, in order that the Court may determine from the *facts* that the testimony of the absent witness is material and necessary. *Harrell* v. *Durrance,* 9 Fla. 490; *Reynolds* v. *Smith,* 49 Fla. 217, 38 So. 903. Tested by this Rule, the certificate and the affidavit upon which this application is based fall far short of any showing that Joseph O'Neill is a "material and necessary witness" in any proceeding pending in New York. It is a safe rule that in any proceeding in which an application for the seizure of any person is sought, the application should state the *facts* upon which such application is based. Section 22 of the Declaration of Rights of the Constitution of Florida guarantees the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and that no warrants shall be issued but upon probable cause supported by oath and affirmation. Warrants for the arrest of any person can only be issued in this State upon oath indicating a probable violation of the law. Sec. 901.02 Fla. Statutes, 3 Fla. Jur. Arrest, pp. 48-49; *Conrad* v. *Van Buren, Cir. Judge,* 144 Mich. 492, 108 NW 347. Neither the affidavit, nor the certificate upon which this application is based set forth any *facts* from which it is made to appear that Joseph O'Neill is a "material and necessary witness", and in the absence of such a showing, this Court is not authorized to issue any summons, or subpoena, and the mere statement of a conclusion that he is a material or necessary witness is insufficient. *Application of Stamler, supra; State* v. *Blount, supra; State* v. *Foquette, supra.*

Upon consideration of the application of the People of The State of New York, the Court is of the opinion that said Application should be denied, and this proceeding dismissed, and therefore, it is

Considered, Ordered, and Adjudged, as follows:

1. That the Motion of Joseph O'Neill to quash and discharge the Rule to Show Cause issued in the above-styled [fol. 135] cause, and directed to him, be and the same is

hereby granted, and said Rule to Show Cause is hereby quashed and discharged, and said Joseph O'Neill is hereby discharged from custody thereunder.

2. That Joseph O'Neill, and the surety upon his bond posted pursuant to said Rule to Show Cause be, and they and each of them are hereby discharged of all liability thereunder.

3. That the attachment issued in the above styled cause for the arrest of said Joseph O'Neill, described therein as Joseph C. O'Neill, be and the same is hereby quashed, and dismissed, and the application of the People of the State of New York for an Order requiring said Joseph O'Neill, named and described therein as Joseph C. O'Neill, be and the same is hereby dismissed, with prejudice and at the cost of said applicant.

Done and Ordered in the City of Miami, Dade County, Florida, this 20 day of July, 1956.

George E. Holt, Circuit Judge.

Appendix

(1) People v. Parker (N. J.—1936), 16 N. J. Misc. 471, 1 A. 2d. 54.

(2) In Re Cooper (N. J.—1941), 127 N.J.L. 312, 22 A. 2d. 532.

(3) In Re Saperstein (N. J.—1954), 30 N.J. Super. 373, 104 A. 2d. 842, Cert. Den. 75 S. Ct. 110, 348 U. S. 874, 99 L. Ed. 688.

(4) U. S. v. Monjor (Del. 1946), 154 F. 2d. 954.

(5) Application of Stamler (N. Y. 1952), 279 App. Div. 908, 111 NYS 2d. 313.

[fol. 136] (6) State v. Blount (Ore. 1954), 200 Ore. 35, 264, P. 2d. 419, Cert. Den. 74 S. Ct. 711, 347 US 962, 98 L. Ed. 1105.

(7) State v. Foquette (Nev. 1950), 67 Nev. 505, 221 P. 2d. 404, Cert. Den. 71 S. Ct. 799, 341 U. S. 932, 95 L.Ed. 1361, 72 S.Ct. 369, 342 US 928, 98 L.Ed. 691.

(8) Vore v. State (Neb. 1954), 158 Neb. 222, 63 N. W. 2d. 141.

(9) People v. Simon (Cal. 1951), 107 Cal. App. 2d. 105, 236 P. 2d. 855, Cert. den. 72 S.Ct. 645, 343 US 911, 96 L.Ed. 1327.

(10) State ex rel Butler v. Swenson (Minn. 1954), 66 N. W. 2d. 1.

(11) In Re Allen (Pa. 1943), 49 Pa. D & C. 631.

[fol. 137]

IN THE CIRCUIT COURT OF DADE COUNTY, FLORIDA

NOTICE OF APPEAL—Filed August 15, 1956

The Applicant, the People of the State of New York, takes and enters its appeal to the Supreme Court of Florida to review the opinion and order of the Circuit Court for Dade County, bearing date the 20th day of July 1956, entered in the above-styled cause, and recorded in the records of said Court in Circuit Court Minute Book 305, Page 145, and all parties to said cause are called upon to take notice of the entry of this appeal.

Frank S. Hogan, District Attorney, New York County, New York, 13, New York; Richard W. Ervin, Attorney General, State of Florida; George A. Brautigam, State Attorney, Eleventh Judicial Circuit of Florida, Attorneys for Applicant.

By William A. Meadows, Jr., Assistant State Attorney.

CERTIFICATE OF SERVICE (omitted in printing)

[fol. 138]

IN THE CIRCUIT COURT OF DADE COUNTY, FLORIDA

ASSIGNMENTS OF ERROR—Filed August 20, 1956

Comes Now the Appellant, the People of the State of New York, by and through its undersigned attorneys, and files this its Assignments of Error, and says:

1. That the Court erred in granting the Motion to Quash the Rule to Show Cause in these proceedings.

2. That the Court erred in its ruling that Chapter 942.02, Florida Statutes, 1955, is unconstitutional.

3. That the Court erred in its ruling that sub-section 1 of Chapter 942.02, Florida Statutes 1955, is unconstitutional, void, and of no effect insofar as the portion of this statute which confers jurisdiction upon any court of record in the State of Florida to make an order directing a witness to appear before a court in another State.

4. That the Court erred in its ruling that sub-section 1 of Chapter 942.02 Florida Statutes 1955 violates the 14th Amendment to the Constitution of the United States, in that it abridges the privileges and immunities of citizens of the several states.

5. That the Court erred in its ruling that sub-section 3 of Chapter 942.02 Florida Statutes 1955 is unconstitutional and void.

6. That the Court erred in its ruling that neither the affidavit nor the certificate upon which your application was based, set forth any facts from which it is made to appear that the applicant is a material and necessary witness, as required by sub-section 2 of Chapter 942.02 Florida Statutes 1955.

[fol. 139] Frank S. Hogan, District Attorney, New York County, New York, 13, New York; Richard W. Ervin, Attorney General, State of Florida;

George A. Brautigam, State Attorney, Eleventh Judicial Circuit of Florida; By: William A. Meadows, Jr., Assistant State Attorney, Attorneys for Appellant.

CERTIFICATE OF SERVICE (omitted in printing)

[fol. 140]

IN THE CIRCUIT COURT OF DADE COUNTY, FLORIDA

DIRECTIONS TO THE CLERK

The Clerk of the above-styled Coaurt (sic) will please prepare the original record in this case, in accordance with Rule 33 (2), Florida Supreme Court Rules for transmission to the Clerk of the Supreme Court of Florida, and will include therein the following:

All of the original papers in this case, except Order and Opinion, Notice of Appeal, and all other appeal papers, and the Clerk will include certified copies of the Order and Opinion, the Notice of Appeal and all other appeal papers, and shall append his certificate, identifying the papers with reasonable definiteness, as provided in Supreme Court Rule 33 (2).

Frank S. Hogan, District Attorney, New York County, New York, 13, New York; Richard W. Ervin, Attorney General, State of Florida; George A. Brautigam, State Attorney, Eleventh Judicial Circuit of Florida; By William A. Meadows, Jr., Assistant State Attorney, Attorneys for Appellant.

CERTIFICATE OF SERVICE (omitted in printing)

[fol. 140-A] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 141]

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1958

Case No. 28,978

In Re: The Application of the People of the State of New York for an Order Requiring One

JOSEPH C. O'NEILL

to Attend and Testify Before the Grand Jury of the County of New York, State of New York.

OPINION—Filed January 22, 1958

An Appeal from the Circuit Court for Dade County, George E. Holt, Judge.

Richard W. Ervin, Attorney General, Reeves Bowen, Assistant Attorney General and Frank S. Hogan, District Attorney, New York County, (New York, N. Y.), for Appellant.

L. J. Cushman, for Appellee.

THOMAS, J.:

On 23 April 1956 there was filed in the Circuit Court of Dade County, Florida, the certificate of Honorable Mitchell D. Schweitzer, Judge of the Court of General Sessions of the State of New York, reciting that he had read an affidavit signed by an Assistant District Attorney of the County of New York, recommending that one Joseph C. O'Neill be taken into custody and delivered to an officer of the State of New York to assure his attendance there and that the witness, O'Neill, be brought immediately before the Florida court for hearing on the matter of extradition.

It was stated in the certificate that the District Attorney had been conducting before a grand jury an investigation of the use of funds of certain labor unions and the activities

of union officials in the handling of such monies. The grand [fol. 142] jury was undertaking to determine whether or not union officials and representatives had conspired to steal funds belonging to the unions in violation of Secs. 580 and 1290 of the Penal Law of New York.

In the certificate O'Neill was designated a material and necessary witness in the investigation. He was described as General President of the Distillery, Rectifying, Wine and Allied Workers' International Union of America, Chairman of the Executive Board, and Chairman of the Social Security Department which administers the welfare fund of the union. The grand jury purposed to learn from him about disposition of the union's funds.

According to the judge's certificate efforts to procure the attendance of O'Neill had been unsuccessful and he had refused to appear voluntarily and testify. Inasmuch as he resided in Illinois, in which no reciprocal witness statute has been enacted, the office of the District Attorney could not compel his presence.

Continuing, it was stated that the District Attorney learned that a convention of the union would be held in Miami 23 April 1956 and that under the constitution of the union the president, O'Neill, was required to be present and preside.

By the certificate O'Neill was assured of protection from arrest or service of civil and criminal process in connection with matters arising before his entrance into New York should he appear under court order.

We see no occasion to give a summary of the statements in the affidavit of the Assistant District Attorney as they seem harmonious with the ones appearing in the judge's certificate which contains sufficient information for determination of the points in controversy.

There was incorporated in the affidavit the request that the court under Sec. 618-a of the New York Code of Criminal Procedure issue the certificate we have described.

Upon the filing of the certificate in the Circuit Court of Dade County the judge ordered the sheriff to attach O'Neill [fol. 143] and bring him forthwith before the court to show cause why an order should not immediately issue for his custody and his delivery to an officer of the State of New

York. Evidently the same day the certificate was filed O'Neill was apprehended and gave bond, although there is no provision in our statute, Sec. 942.02, Florida Statutes 1955, for such a bond.

A month later O'Neill filed a response and after another month had passed a hearing was held by the circuit judge when arguments of Assistant District Attorneys from New York and O'Neill's counsel were presented but at which no testimony was taken. Subsequently the judge, basing his opinion on the record, concluded that Sec. 942.02, supra, was unconstitutional because by it the state was given extraterritorial jurisdiction, the right of ingress and egress across the state line was impaired and the witness could be taken into custody here and delivered into custody of an officer of another state without bail. Also, the judge thought the certificate of the Judge of the Court of General Sessions of New York and the affidavit of the Assistant District Attorney did not depict a situation showing that O'Neill was a material and necessary witness.

We dismiss the last point with the observation that it is plain to us O'Neill is a material and necessary witness in the investigation of the misuse of funds of the union. By the terms of the act, the certificate of the judge must be taken as "prima facie evidence of all the facts stated therein." It may be logically deduced that because of the positions held by O'Neill he is familiar with the funds of the organization if, indeed, he does not supervise or control them, and we think that in an investigation of the administration of those funds he would prove a material and necessary witness.

It is stated in the brief of the Attorney General that the "appellant" filed a notice of appeal and filed "its" assignments of error and "its" directions to the clerk. [fol. 144] Upon an examination of the record, we find that the notice of appeal was filed by "The Applicant, the People of the State of New York" and that it, the assignments of error and the directions to the clerk, carried the names of the District Attorney of New York County, the Attorney General of Florida, the State Attorney of the Eleventh Judicial Circuit and an Assistant State Attorney but were signed only by the Assistant State Attor-

ney. On the notice of appeal these officers were described as attorneys for "applicant" and on the assignments of error and directions to the clerk, as attorneys for "appellant".

Soon after the appeal was lodged here the attorney for Joseph C. O'Neill moved to dismiss it, and the members of the court sitting at the time deferred a ruling until hearing of the cause on the merits.

We have now reconsidered the motion and have concluded we should proceed to a determination of the dispute on the merits, that is, the adjudication of the validity of Sec. 942.02, supra. The motion was based on the ground that this court had no jurisdiction because the order attempted to be reviewed was entered in a criminal proceeding and the state had no right to appeal except from orders specified in Sec. 924.07, Florida Statutes 1955, of which the order of the circuit judge was not one, and further that the People of the State of New York had no right of appeal. The Attorney General countered on the ground that the case was a civil proceeding and asked this court to consider the appeal a petition for certiorari, under Sec. 59.45, Florida Statutes 1955, if it appeared that the appeal had been improvidently taken.

We agree with the Attorney General that the proceeding is not criminal and that appeal was the proper method of review as, by Sec. 5 of Art. V of the Constitution, this court had "appellate jurisdiction in all cases at law * * * originating in Circuit Courts * * *." The case originated in the circuit court and the appeal was filed before the effective date of the amendment of Art. V adopted in November 1956.

[fol. 145] The procedure followed by the Attorney General is rather unusual because the record does not show any participation by him until the circuit judge had ruled. His name first appears on the notice of appeal. But the State of New York, in our opinion, had the right to appeal as O'Neill would have had if the judgment had been unfavorable to him. The appeal became effective when the notice was filed by the District Attorney of New York County. The introduction of the Attorney General into the controversy was somewhat unorthodox but in view of

the mandate in Sec. 22 of Art. IV of the Constitution that he "perform such other legal duties as may be prescribed by law" and the requirement of Sec. 16.01, Florida Statutes 1955, that he "appear in and attend to in behalf of the state, all suits or prosecutions, civil or criminal, or in equity, in which the state may be a party, or in any wise interested * * *" we will consider his entrance via the notice of appeal an effort to present the interest of the state in the preservation of the statute. This concern of the state in maintaining the validity of the law comes from the law's reciprocal nature. If the act is held unconstitutional, then, of course, the attendance here of witnesses residing in states having such a uniform act cannot be accomplished.

The act is known as the "'uniform law to secure the attendance of witnesses from within or without a state in criminal proceedings,'" Sec. 942.06, Florida Statutes 1955, and F.S.A., and is "only applicable to such state as shall enact reciprocal powers to this state relative to the matter of securing attendance of witnesses" as provided in it. Sec. 942.05, Florida Statutes 1955. It was enacted in New York, Code of Criminal Procedure 618-a, supra.

We return now to the procedure outlined. If it is recommended in the certificate that the witness be taken into immediate custody and delivered to an officer of the state making the request, the judge may, instead of notification of the hearing, order the witness brought before him at once. Such a recommendation was made in this case and [fol. 146] such an order was initially entered. It is provided in the act that if at the hearing the custody and delivery appear to the resident judge "desirable", he may order the witness placed in custody and delivered to an officer of the state making the request.

Evidently The People of the State of New York intended by the certificate of the judge to coerce the attendance of O'Neill by one process or the other but preferred to have the witness taken into custody. When the circuit judge in Dade County entertained the certificate, two courses were available. He could have notified the prospective witness of a hearing to determine whether or not the witness should be subpoenaed to testify before the grand jury in

New York. On the other hand, in view of the recommendation that the witness be taken into custody, the judge could have directed that the witness be immediately brought before him and then, if the judge was "satisfied of the desirability" that the witness should be placed in custody and delivered to an officer of the State of New York, he could have followed that procedure instead of issuing a subpoena.

The latter course seems to have been first chosen by the circuit judge, but upon hearing he decided not to put O'Neill in custody or place him under summons because of his conviction that the whole act was invalid.

In the circumstances it seems to be our obligation to decide the constitutionality of Sec. 942.02, supra, whether the procedure be to seize and deliver a witness or to place him under subpoena. We will discuss the two aspects in that order.

Certain salient facts should be remembered in judging the merits of the act as it would operate on O'Neill. He is not charged with crime. On the contrary, it is stated in the judge's certificate that the laws of New York would guarantee O'Neill, if taken there pursuant to this proceeding, protection from arrest and the service of criminal process. Parenthetically, this assurance was given in the certificate but it is extremely doubtful if the act itself provides for [fol. 147] such a safeguard, except in the case where a summons is issued as distinguished from seizure and delivery of the witness.

Although the uniform law was adopted by The National Conference of Commissioners on Uniform State Laws more than a quarter century ago and, incidentally, enacted by this State in 1941, there is a dearth of judicial decision on its operation and validity.

It appears from the opinion of the circuit judge and the brief filed by the appellee that but one court has passed directly upon the provisions of the act attempting to authorize the summary procedure, namely, a District and County Court of Pennsylvania in In Re Allen, 49 Pa. D & C 631. The court seems to have primarily considered the title of the act under attack, but it did declare the provisions for seizure of a witness and his delivery to the

officer of a foreign state invalid because they violated Sec. 2 of Art. IV and the privileges and immunities provision of the Fourteenth Amendment of the Federal Constitution. The Constitutionality of the uniform act was considered in In Re Cooper, 127 N.J.L. 312, 22 A.2d 532, and in In Re Saperstein, 30 N.J. Super. 373, 104 A.2d 842, but in neither of these was the validity of the particular provisions for seizure and delivery of a witness specifically determined. In the former it was contended that the title of the act was not sufficient to make a witness for a defendant subject to its provisions with reference to the issuance of subpoenas. It is true that the provisions for seizure of a witness were assailed but clearly no attempt to invoke them had been made. In the latter decision the points presented were not the same as those we are considering.

By the Fourteenth Amendment of the Constitution of the United States the states are enjoined from making or enforcing "any law which shall abridge the privileges or immunities of citizens of the United States * * *." It also contains the guarantee that a state shall not deprive a person of liberty "without due process of law." And in the first paragraph of Sec. 2 of Art. IV of the Constitution [fol. 148] is incorporated the guarantee that also seems immediately involved in the question whether or not a person who is not charged with crime of any sort may be restrained of his freedom because he is needed elsewhere as a witness in an investigation by a grand jury. Not only are the privileges and immunities of citizens of the United States placed beyond the power of the state to impair but citizens of each state are vouchsafed the privileges and immunities of the citizens of all the states. The following paragraph of Sec. 2 of Art. IV gives emphasis to the preceding one and forms an exception to it for such privileges and immunities are not guaranteed to the person charged with "Treason, Felony, or other Crime" who flees from justice. The state to which he flees must deliver him up "on Demand of the executive Authority of the State from which he fled * * *."

We agree with the circuit judge that the right of O'Neill to ingress and egress would be impaired if not destroyed if the circuit judge were to order his seizure, as was

"recommended". He would no longer have been allowed freely to pass from the State of Florida to another state but would have been taken to New York whether or not he wished to go there and he would have been prevented from returning to his home state of Illinois although it is quite clear that he came to this state for a visit of but a few days to attend a convention.

We think the provisions of the Fourteenth Amendment forbad the passage by the legislature of Florida of a law which would so interfere with the movement of a citizen of the United States who as a citizen of Illinois was privileged to move freely from his state to Florida and back. This privilege would have been nullified, of course, had he become a fugitive from justice which is not the case.

In Twining v. New Jersey, 211 U.S. 78, 29 S.Ct. 14, 53 L. Ed. 97, it was written: "Privileges and immunities of citizens of the United States, on the other hand, are only [fol. 149] such as arise out of the nature and essential character of the national government, or are specifically granted or secured to all citizens or persons by the Constitution of the United States. Slaughter-House Cases, supra, p. 79; Re Kemmler, 136 U.S. 436, 448, 34 L.ed. 519, 524, 10 Sup. Ct. Rep. 930; Duncan v. Missouri, 152 U. S. 377, 382, 38 L.ed. 485, 487, 14 Supt. Ct. Rep. 570. Thus, among the rights and privileges of national citizenship recognized by this court are the right to pass freely from state to state (Crandall v. Nevada, 6 Wall. 35, 18 L.ed. 745); * * *."

We think that operation of the statute in question would constitute a definite interference with the right of a citizen of the state and of the United States to move freely from one state to another, and we think of no better illustration than what would have occurred in this case had the circuit judge accepted the "recommendation" and found it "desirable" to send O'Neill to New York in custody. A Citizen of Illinois, comes to Florida for a brief visit; he is haled into court and confronted with an order placing him in custody of an officer who will conduct him to New York. His privilege of staying, or returning to his home in Illinois, or of going elsewhere, is brought to an end. It is difficult to imagine a harsher infringement of the right

a citizen has to go from place to place which is a privilege, according to the expressions of the Supreme Court of the United States, secured to him under the Fourteenth Amendment.

O'Neill is entitled under Sec. 2 of Art. IV, supra, to all the privileges and immunities of all the citizens of all the other states so long as he has not committed crime for which he could be extradited. The power to remove him in this isolated situation is found in that section. The courts have held that this kind of extradition depends on the Constitution of the United States, People v. Hiatt, 172 N.Y. 176, 64 N.E. 825, and not on comity, courtesy or contract. Ex parte Thompson, 85 N.J. Eq. 221, 96 A. 102.

[fol. 150] We think the matter is purely one of conflict with the Federal Constitution; that the act violates the constitution, and consequently cannot be upheld.

Inasmuch as the circuit judge apparently could have put the witness under subpoena if he concluded against the "desirability" of placing him in custody and could have bound the witness to appear, or be held in contempt, and since the judge held the whole act unconstitutional and discharged O'Neill, we decide, too, the question of the validity of the law as it would be applied in the other instance.

It was the view of the circuit judge that the courts of this state were without power to issue process effective beyond the borders of the state. This general rule we understand is true. Passett v. Chase, 91 Fla. 552, 107 So. 689. Nor can civil process operate beyond the limits of the state so as to form a basis for a money judgment against one residing without although he has been made a party to the litigation by constructive service. Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565.

Because we believe, after careful study, that this feature of the law is unconstitutional, for the reasons we have given, we find no occasion to discuss the question whether or not it violates Secs. 9 and 12 of the Declaration of Rights of the Constitution of Florida and the Eighth and Fourteenth Amendments of the Constitution of the United States because no bail is provided for persons attached and delivered into custody of an officer of another state.

We ask the rhetorical question: How, then can a Florida court enforce an order to appear before a court of another state when the operation of the order clearly extends beyond state limits? While any person is within the boundaries of this state he is subject to orders entered against him by courts properly exercising their jurisdiction, but it would be inconsistent with the decisions cited to hold that such a court could command a witness to appear in New York, send him on his way, then, if the witness did not appear in New York, punish him here for his failure there [fol. 151] "in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state." It is not clear just what court would administer the punishment in the event of default because that part of the act provides that "he shall be punished" in the manner described. Conceivably his failure would be contemptuous of both courts. If the Florida court attempted to inflict punishment, it would be for failure to comply in New York; if the New York court undertook to inflict punishment, it would be for failure to obey a summons set in motion in Florida. Either way the Florida process would be operating extra-territorially.

The Attorney General concedes in his brief that the Supreme Court of the United States has held that among the privileges of American citizenship guaranteed by the Fourteenth Amendment is the right to pass freely from state to state, citing Twining v. New Jersey, supra. He takes the position that Sec. 2 of Art. IV has no application to the facts of this case because, as we understand it, the statute, Sec. 942.02, does not discriminate between the citizens of Florida and the citizens of any other state. This would mean that O'Neill, a sojourner from Illinois, could be summarily put in custody or placed under subpoena, because any citizen of Florida could be treated the same way. To extend this argument the law would be valid because in those states that have adopted it any person could be placed in custody or put under subpoena, to coerce his appearance as a witness in any other state that had adopted the law.

This might be an answer to a charge of discrimination but it does not follow that if a law is invalid for some reason it should nevertheless be held good because, bad as it is, it effects (sic) all persons the same.

As we interpret the Fourteenth Amendment, the citizens of Florida and New York which have adopted the uniform law, may, as citizens of the United States, go where they please, and so may the citizens of Illinois and other states [fol. 152] that have not enacted it. If, aside from the question now of discrimination, a citizen of a state having no such law, Illinois, travels to a state having it, Florida, and there is made subject to the law because another state, New York, thinks his presence there is "desirable", it cannot be true that the right of all the citizens of all the states to move among them has not been impaired.

The Attorney General quotes liberally from the opinion in Commonwealth of Massachusetts v. Klaus, 130 N.Y.S. 713, decided by the Appellate Division of the Supreme Court of New York, and italicizes a statement in the opinion of that court that it was conceded in the brief "that the right of free ingress and egress was never intended to enable a citizen of the United States to interfere with the orderly administration of justice within the territorial boundaries of the state" and that a citizen when "within the boundaries of a state" is amenable to the constitution and laws of that state and that the privileges and immunities clause affords him only protection against unjust discrimination. This concession, said the court, was a complete answer to the charge that a law, similar to the one before us, was unconstitutional. So this decision helps us little.

We are not able so easily to decide the matter before us for we do not think that Sec. 2 of Art. IV read with the pertinent part of the Fourteenth Amendment justifies the view that no rights are abridged if no discrimination is practiced.

The Attorney General argues that "[n]o power was delegated * * * to the United States to require free ingress and egress when to do so would defeat one of the primary purposes for which the state governments were instituted, viz., the protection of the people from *criminals*." (Italics

ours.) Nor does the Constitution prohibit the states from impairing the right of free ingress and egress to the extent required to protect themselves against *criminals*.

We do not find in the provisions of the law a basis for the position. The act refers to prosecutions and grand jury [fol. 153] investigations but we have ascertained nothing in it with reference to restricting such testimony to use by the state in either. The procedure is inaugurated by a certificate of a judge of record of the requesting state that the person sought to be extradited "is a material witness *in* such prosecution, or * * * investigation." We have supplied the italics. Furthermore, the preceding section, Sec. 942.01, Florida Statutes 1955, titled "Definitions" contains the following: "'Witness'—as used in this chapter [942], shall include a person whose testimony is desired *in* any proceeding or investigation by a grand jury or *in* a criminal action, prosecution or proceeding held by the prosecution *or the defense.*" (Italics ours.) So, evidently the procedure would be available to a defendant as well as the prosecution.

We realize that the right of ingress and egress is not absolute, for instance, the Fourteenth Amendment does not limit exercise by the state of the police power to protect the health, morals and general welfare of the people. Butchers' Union S.H. and L.S.L. Co. v. Crescent City L.S.L. and S. H. Co., 11 U.S. 746, 28 L. Ed. 585, 4 S. Ct. 652. But we do not discern in the present state of facts any of the elements of an exception.

The Attorney General concedes that circumstances might exist under which bodily delivery of a witness would be unreasonable and that "it was never intended to authorize the delivery of a witness * * * where the circumstances are such that it would be unreasonable to do so * * *." This statement is followed by the remark: "when the statute is thusly construed there is nothing unreasonable about it." In this connection we refer, again, to the procedure. If the judge of the demanding state certifies the "desirability" of bodily delivery, it shall be prima facie evidence of the "desirability" and the judge here may, if satisfied with the "desirability", have the witness taken into custody. We cannot decide the constitutionality or unconstitutionality of the act under attack by simply saying

that if the circumstances are reasonable there is nothing unreasonable about the act.

[fol. 154] After a careful study of both features of the law, we are convinced that it is unconstitutional and that the circuit judge ruled correctly when he held it so.

Affirmed.

Terrell, C.J., Hobson, Thornal and O'Connell, JJ., concur.

[fol. 155]

IN THE SUPREME COURT OF FLORIDA

In Re: The Application of the People of the State of New York for an Order Requiring

JOSEPH C. O'NEILL

to Attend and Testify Before the Grand Jury of the County of New York, State of New York.

JUDGMENT—January 22, 1958

This cause having heretofore been submitted to the Court upon the transcript of the order herein, and briefs and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said order; it is, therefore, considered, ordered and decreed by the Court that the said order of the Circuit Court be and the same is hereby affirmed; it is further ordered by the Court that the Appellee do have and recover of and from the Appellant his costs by him in this behalf expended, except the $12.00 filing fee which has been paid by the Appellant, and that all costs shall be taxed in the Court in which the appeal was entered, all of which is ordered to be certified to the Court below.

The Opinion of the Court in this cause prepared by Mr. Justice Thomas was this day ordered to be filed.

[fol. 157]

IN THE SUPREME COURT OF THE STATE OF FLORIDA

[Title omitted]

APPELLANT'S PETITION FOR REHEARING—
Filed February 4, 1958

Comes now the appellant and petitions the Court for a rehearing in this cause upon the following grounds:

1. The Court overlooked and failed to consider that its decision is in direct conflict with the tenor and spirit of the United States Supreme Court's holding in *Kentucky* v. *Dennison,* 24 How. 66, to the effect that in the absence of any enabling federal constitutional provision, the states may mutually support each other in bringing offenders to justice and thus provide for the internal safety of each of them through the exercise of comity. Without witnesses, offenders cannot be brought to justice. Without witnesses, the internal safety of the states cannot be secured.

2. The Court overlooked and failed to consider that its [fol. 158] decision is in conflict with the tenor and spirit of the holding of the United States Supreme Court in *Innes* v. *Tobin,* 240 U. S. 127, and with the tenor and spirit of the holdings of this Court in *Ennist* v. *Baden,* 158 Fla. 141, 28 So. 2d 160, and *State* v. *Bennett,* 90 So. 2d 43, all holding that, without the benefit of any enabling federal constitutional provision, a state may, in the exercise of its reserved powers, constitutionally enact legislation authorizing the surrender to another state of a person charged with crime in the latter state who is not subject to extradition under federal law. Having defendants available for trial is of no avail if a state cannot procure witnesses against them. A state has just as much reserved power to surrender witnesses as it has to surrender defendants, the surrender in each case being made through comity for the purpose of assisting another state to bring offenders to justice and to preserve its internal security.

3. The Court overlooked and failed to consider that its decision denies a state's power to procure attendance of a

witness through the comity and cooperation of a sister state despite the fact that the exercise of that power would entail no greater interference with his basic freedom of movement as a citizen than if the interference occurred within the bounds of the state where the witness is desired.

4. The Court overlooked and failed to consider that its decision magnifies the individual freedom of a witness to [fol. 159] move without restraint across state lines to the complete exclusion of his duty to aid in law enforcement as a material witness in any state and to the exclusion of the greater right and duty of a state to enforce its laws for the protection of its people.

5. The Court overlooked and failed to consider that its decision effectively opens the door for material witnesses in Florida to cross over the state line and thumb their noses at the Florida courts, no matter how serious the crime which they witnessed and no matter how indispensable their testimony may be.

6. The Court overlooked and failed to consider that its decision raises the right of a witness to a crime in another state to asylum in Florida above and beyond his duty as a citizen to respond to process and give material evidence often vitally essential to quell the lawless for the protection of society.

7. The Court overlooked and failed to consider that its decision will in many cases have the effect of rendering courts of other states helpless in their investigation of crime by assuring sanctuary for fleeing witnesses; and that its decision will render Florida wholly unable to procure witnesses from other states because of its lack of power to reciprocate.

8. The Court overlooked and failed to consider that its decision denies law enforcement a long used and honored [fol. 160] method of enforcing the appearance of fugitive witnesses in this day of nation-wide syndicated rackets, lotteries, narcotic rings, etc., and has the effect of permitting such witnesses to use modern fast transportation to flee from states where their testimony is material. It leaves the way wide open for the lawless to materially help

their cause and to delay and possibly defeat criminal investigations by inducing material witnesses to leave the state.

9. The Court overlooked and failed to consider that its decision interposes a barrier, coincident with state lines, to the employment of vitally necessary reciprocity and comity between states throughout the nation, which reciprocity and comity is nevertheless requisite for the procurement of material evidence essential to the proper functioning of trial courts which, in turn, is essential to the internal security of the people of each state.

10. The Court overlooked and failed to consider that its decision gives an absolutism to the right of a citizen to pass freely into another state which transcends his duty to the society of his state to appear as a material witness.

11. The Court overlooked and failed to consider that its decision makes paramount the right to cross a state line to the exclusion of the needs of both state courts and society in general.

12. The Court overlooked and failed to consider that not [fol. 161] even the great freedoms of the constitution, such as freedom of speech, press, worship and assembly, are beyond interference for the public good; and that when a citizen's freedom to go to another state is interfered with in order to serve a public need for him to appear as a witness, the interference is slight indeed, is not unreasonable, and is for a very essential public purpose.

13. The Court overlooked and failed to consider that, as held by the United States Supreme Court in *Pennoyer* v. *Neff*, 95 U. S. 714, every state, and hence the State of Florida, possesses exclusive jurisdiction and sovereignty over persons and property within its territory; that Section 942.02 operates solely upon persons found within the State of Florida; that said statute makes no provision for the service of Florida process in another state; and that the summons authorized by said statute is to be served within the State of Florida and does not run into another state.

Wherefore, the appellant petitions the Court to grant a rehearing in this cause.

[fol. 162] Respectfully submitted,

Richard W. Ervin, Attorney General, Reeves Bowen, Assistant Attorney General, Frank S. Hogan, District Attorney, New York County, 155 Leonard Street, New York 13, New York, by /s/ Reeves Bowen, Assistant Attorney General, Counsel for Appellant.

[fol. 163] Certificate of Service (omitted in printing).

[fol. 164]

IN THE SUPREME COURT OF FLORIDA

In Re: The Application of the People of the State of New York for an Order Requiring One

JOSEPH C. O'NEILL

to Attend and Testify Before the Grand Jury of the County of New York, State of New York.

ORDER DENYING PETITION FOR REHEARING—
February 24, 1958

On consideration of the Petition for Rehearing filed by Counsel for Appellant,

It Is Ordered by the Court that the said petition be, and the same is hereby, denied.

[fol. 165]

IN THE SUPREME COURT OF FLORIDA

In Re: The Application of the People of the State of New York for an Order Requiring One

JOSEPH C. O'NEILL

to Attend and Testify Before the Grand Jury of the County of New York, State of New York.

JUDGE'S CERTIFICATE AS TO OPINION—March 25, 1958

We, the undersigned Justices of the Supreme Court of Florida, being all of the Justices who participated in the decision of the above styled case, hereby certify as follows:

In the concluding paragraph of our opinion in this case, we held as follows:

"After a careful study of both features of the law, we are convinced that it is unconstitutional * * * *"

The law referred to in said quoted portion of our opinion was Section 942.02, Florida Statutes 1955.

The two features of said law referred to in said quoted matter were (1) the feature of said law which authorizes taking a witness into custody and delivering him to an officer of the requesting state; and (2) the feature of said law which authorizes the issuance of a summons requiring the attendance of a witness in the requesting state.

[fol. 166] Our holding in said quoted part of our opinion that said law is unconstitutional as to both of said features had reference to the privileges and immunities clause of Section Two of Article Four of the United States Constitution and to the privileges and immunities clause of the Fourteenth Amendment to said Constitution, and our intention in making said holding was that, as to each of said features of said law, said law is unconstitutional because it conflicts with both of said privileges and immunities clauses of the United States Constitution.

This the 25th day of March, 1958.

Glenn Terrell, Chief Justice, Elwyn Thomas, Justice, T. Frank Hobson, Justice, Campbell Thornal, Justice, Stephen O'Connell, Justice.

[fol. 167]

IN THE SUPREME COURT OF FLORIDA

[Title omitted]

ORDER RE RECORD—April 8, 1958

The Attorney General has filed a motion for an order directing that the following papers in this cause be made a part of the record in order to place the whole case before the United States Supreme Court to-wit:

1. The appellant's petition for rehearing.

2. This Court's order denying the appellant's petition for rehearing.

3. The certificate as to the federal questions referred to in this Court's opinion and decided thereby, which certificate was dated March 25, 1958 and was signed by all of the justices of this Court who participated in the decision of this cause.

Upon consideration thereof, it is ordered that the said motion be and the same is hereby granted.

[fol. 168] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 169]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed June 2, 1958

The petition herein for a writ of certiorari to the Supreme Court of the State of Florida is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT U. S.
APR 21 1958
JOHN T. FEY, Clerk

SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. 53

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

vs.

JOSEPH C. O'NEILL,

Respondent.

PETITION FOR CERTIORARI TO THE SUPREME COURT OF FLORIDA

RICHARD W. ERVIN
Attorney General
The Capitol
Tallahassee, Florida

REEVES BOWEN
Assistant Attorney General
The Capitol
Tallahassee, Florida

FRANK S. HOGAN
District Attorney
New York County
155 Leonard Street
New York 13, N. Y.
Counsel for Petitioner

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SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. ————

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

v.

JOSEPH C. O'NEILL,

Respondent.

PETITION FOR CERTIORARI TO THE SUPREME COURT OF FLORIDA

Comes now the petitioner, The People of the State of New York, and respectfully petitions this Court to issue a writ of certiorari to review the hereinafter mentioned decision of the Supreme Court of Florida, entered on January 22, 1958.

OPINIONS OF THE COURTS BELOW

The opinion of the Circuit Court of Dade County, Florida, was delivered on July 20, 1956 and is reported in 9 Florida Supplement 153-164. A copy thereof is appended hereto as Appendix "A."

The opinion of the Supreme Court of Florida was de-

livered on January 22, 1958 (R. 141-154), and it is reported in 100 So. 2d 149-157 (Advance). A copy thereof is appended hereto as Appendix "B."

JURISDICTION

The judgment sought to be reviewed is dated January 22, 1958, and was entered on said date (R. 155). A copy thereof is appended hereto as Appendix "C."

Said judgment became final on February 24, 1958, when the Supreme Court of Florida entered its order (R. 164) denying the petition for rehearing (R. 156-163) which was timely filed by the petitioner on February 4, 1958.

It is believed by the petitioner that Section 1257(3) of Title 28, U. S. Code, confers on this Court jurisdiction to review the judgment in question by writ of certiorari.

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are as follows:

QUESTION ONE

Is Section 942.02, Florida Statutes 1955, being a part of the "uniform law to secure the attendance of witnesses from within or without a state in criminal proceedings," unconstitutional because of conflict with the privileges and immunities clause of Section Two of Article IV of the Constitution of The United States or with the privileges and immunities clause of the Fourteenth Amendment to said Constitution, or with both of said privileges and immunities clauses, insofar as said Statute authorizes a judge of a Court of Record in Florida to order that a witness in Florida be taken in cus-

tody and delivered to an officer of a requesting state for the purpose of procuring such witness' testimony in a criminal prosecution or Grand Jury investigation in a court of the requesting state, where such requesting state has also enacted a similar reciprocal law?

QUESTION TWO

Is Section 942.02, Florida Statutes 1955, being a part of the "Uniform Law to secure the attendance of witnesses from within or without a state in criminal proceedings," unconstitutional because of conflict with the privileges and immunities clause of Section Two of Article IV of the Constitution of the United States or with the privileges and immunities clause of the Fourteenth Amendment to said Constitution, or with both of said privileges and immunities clauses, insofar as it authorizes the judge of a court of record in Florida to issue a summons to a witness in Florida directing him to attend and testify in a court of a requesting state in a criminal prosecution or grand jury investigation, where such requesting state has also enacted a similar reciprocal law?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutibnal provisions which this case involves are the privileges and immunities clause of Section Two of Article IV, Constitution of the United States, reading as follows:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

and the privileges and immunities clause of the Fourteenth

Amendment to the Constitution of the United States, readings as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States * * *"

The statute which this case involves is Section 942.02, Florida Statutes 1955, which, along with Sections 942.01 and 942.03-942.06, Florida Statutes 1955, make up the "Uniform law to secure the attendance of witnesses from within or without a state in criminal proceedings." Said statutes are found in Volume 2, Florida Statutes 1955, at pages 2927-2928. Since said Section 942.02 is lengthy, it is not copied in this petition at this point but is set forth in the appendix hereto. Also, in order that all of said uniform law may readily be examined by the Court, the other above mentioned Sections thereof are also copied into the Appendix. (Appendix "D")

STATEMENT OF THE CASE

In 1936 New York enacted the uniform law to secure the attendance of witnesses from within or without a state in criminal proceedings and the same may be found as Section 618-a of the New York Code of Criminal Procedure.

In 1941, Florida adopted said uniform law and it later became Sections 941.01-941.06, Florida Statutes 1955, which are copied into the Appendix hereto. (Appendix "D").

On April 23, 1956, there was filed in the Circuit Court of Dade County, Florida, a certificate executed pursuant to the requirements of said uniform law by Honorable Mitchell D. Schweitzer, one of the judges of the Court of General

Sessions, County of New York, State of New York (R. 1-6), seeking to require the attendance of the respondent, Joseph C. O'Neill, as a witness before a New York grand jury, the said respondent being a resident of the State of Illinois but being present in the State of Florida. Appended to said certificate was the affidavit upon which it was based, said affidavit having been executed by New York Assistant District Attorney Francis X. Clark (R. 7-11).

Said certificate recommended that the respondent be taken into immediate custody and delivered to an officer of the State of New York to assure his attendance in New York (R. 4).

An attachment for the respondent, requiring his production before said Circuit Court to show cause, was issued on April 23, 1956 (R. 13-14). He was ordered released on bond (R. 16) and he made the required bond (R. 17).

On May 28, 1956, the respondent filed his response and motion to quash said rule to show cause (R. 20-25), wherein he raised the federal questions here sought to be reviewed in words as follows (R. 20-21):

> *"FIRST: That Chapter 942 Florida Statutes 1955, and particularly Sections 942.01 to 942.06 Florida Statutes,* entitled the 'Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings' *and each and every section thereof, separately and severally,* and Section 618-a, of the Code of Criminal Procedure of the State of New York, and each and every section thereof, *are unconstitutional, and null and void, because: (Emphasis supplied).*
>
> • • • • •

"(5) That each of said Acts, and each and every section thereof, separately and severally, is in contravention of and violates Article Four, Section 2, and the Fourteenth Amendment to the Constitution of the United States in that same abridges the privileges and immunities of Citizens of the United States, and deprives respondent of his liberty without due process of law and denies respondent the equal protection of the laws."

On July 20, 1956, after a hearing before said Circuit Court at which no evidence was presented (R. 57-120), said Court rendered its opinion and order (9 Fla. Supp. 153-164; R. 124-136; Appendix "A") in which its passed upon the respondent's above quoted contention by holding Section 942.02 to be violative of the Fourteenth Amendment to the United States Constitution in that it abridges the privileges and immunities of citizens of the several states by impairing their right of free ingress and egress from state to state, as appears from the following quotation from said Court's opinion and order (R. 130; Appendix "A"):

"Passing for the moment, the fact that the Legislature of this State is powerless to confer upon this, or any other Court of the State of Florida, jurisdiction to issue process running beyond the limits of the State, Section 942.02 Fla. Statutes 1955 also violates the Fourteenth Amendment to the Constitution of the United States in that it abridges the privileges and immunities of citizens of the several states, since it impairs the right of free ingress and egress from state to state, which is one of the rights of national citizenship guaranteed by the Fourteenth Amendment to the Constitution of the United States. Edwards v. California, 314 US 160, 62 S. Ct. 164; In Re. Allen, supra; Commonwealth

v. Klaus, supra, and Commonwealth v. Pennsylvania, supra."

and by sustaining the respondent's motion to quash and discharge the rule to show cause in words as follows (R. 134-135; Appendix "A"):

"Upon consideration of the application of the People of The State of New York, the Court is of the opinion that said Application should be denied, and this proceeding dismissed, and therefore, it is

"CONSIDERED, ORDERED, AND ADJUDGED, as follows:

"1. That the Motion of JOSEPH O'NEILL to quash and discharge the Rule to Show Cause issued in the above-styled cause, and directed to him, be and the same is hereby granted, and said Rule to Show Cause is hereby quashed and discharged, and said JOSEPH O'NEILL is hereby discharged from custody thereunder."

In said opinion and order, said Circuit Court also held Section 942.02, Florida Statutes 1955, to be unconstitutional upon the grounds that it attempted to give the courts of Florida extra-territorial jurisdiction to issue process, and that it unconstitutionally permitted a witness to be taken into custody and delivered to an officer of the requesting state without allowing such witness to make bail. Said Court further held that said certificate and affidavit did not state sufficient facts to show that the respondent was a material and necessary witness.

On August 15, 1956, the petitioner filed its notice of ap-

peal from said order to the Supreme Court of Florida (R. 137) and thereafter duly perfected its appeal to said Supreme Court.

The petitioner duly raised in said Supreme Court the federal questions here sought to be reviewed in its assignments of error numbered 1, 2, 3 and 4, reading as follows (R. 138):

> "1. That the Court erred in granting the Motion to Quash the Rule to Show Cause in these proceedings.
>
> "2. That the Court erred in its ruling that Chapter 942.02, Florida Statutes, 1955, is unconstitutional.
>
> "3. That the Court erred in its ruling that subsection 1 of Chapter 942.02, Florida Statutes 1955, is unconstitutional, void, and of no effect insofar as the portion of this statute which confers jurisdiction upon any court of record in the State of Florida to make an order directing a witness to appear before a court in another State.
>
> "4. That the Court erred in its ruling that subsection 1 of Chapter 942.02 Florida Statutes 1955 violates the 14th Amendment to the Constitution of the United States, in that it abridges the privileges and immunities of citizens of the several states."

On January 22, 1958, the Supreme Court of Florida handed down its opinion (100 So. 2d 149-157; R. 141-154; Appendix "B") and its judgment (R. 155; Appendix "C") affirming the order appealed from. Said opinion answered the federal questions here involved by holding that said

Section 942.02 unconstitutionally conflicts with the privileges and immunities clauses of Section Two of Article IV and the Fourteenth Amendment to the United States Constitution, (1) insofar as said statute permits a witness to be taken into custody and delivered to an officer of the requesting state, and (2) insofar as it authorizes the issuance of a summons requiring a witness to attend and testify in a criminal matter in the courts of another state. *[In this connection, see the certificate of the Justices of the Supreme Court of Florida who participated in said Court's decision (R. 165-166; Appendix "E"), which certificate clearly shows that said Court's holding that said statute is unconstitutional has reference to the privileges and immunities clauses of Section Two of Article IV and the Fourteenth Amendment to the United States Constitution.]*

The said opinion did not pass upon the question of whether said statute is unconstitutional as attempting to confer upon the Courts of Florida extraterritorial jurisdiction to issue process.

The said opinion specifically declined to pass upon the question of whether the said statute is unconstitutional because it does not provide for bail for persons attached and delivered into custody of an officer of another state.

Said opinion of the Supreme Court of Florida specifically overturned the Circuit Court's holding that the certificate of the judge of the requesting state did not state sufficient facts to show that the respondent was a material and necessary witness.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI

The petitioner submits that the two above stated questions which were decided by the Supreme Court of Florida are federal questions of substance which have never been determined by this Court and that this is a special and important reason for granting the writ of certiorari within the contemplation of this Court's Rule 19(1)(a).

It appears clear that neither of said federal questions has ever been determined by this Court.

It is also clear that each of said federal questions is a question of substance and is of tremendous importance to the administration of the criminal laws of the forty-three jurisdictions (forty-two states and Puerto Rico) which have adopted the said uniform law to secure the attendance of witnesses in criminal proceedings. These forty-three jurisdictions (listed in Volume 9, Uniform Laws Annotated, 1957 edition, page 86) are utterly dependent upon the reciprocal operation of said uniform law for the authority to enforce the attendance from other states of material and necessary witnesses in criminal proceedings.

The purpose of said uniform law, as stated in *People of New York v. Parker* (N. J.), 1 A. 2d 54, 55, is as follows:

> "Obviously the object of this statute is to promote the enforcement of the criminal laws and the administration of justice in criminal proceedings in the several states."

And as was said in *In re Saperstein* (N.J.), 104 A. 2d 842, 846:

"In view of the earlier determinations of our courts on matters concerning somewhat similar statutes and the fact that the uniform act was enacted in aid of comity between states to assist the orderly and effectual administration of justice and prosecution of criminal conduct * * *."

It is fully as important for a state to have witnesses against a defendant as it is to have custody of the defendant himself. It is of no help to a state to acquire custody of a defendant by arresting him within its own borders or by extraditing him from another state and at the same time say to that state that it is completely powerless to procure vitally necessary witnesses against him from another state even though the latter state is willing, as a matter of comity, to use the processes of its courts to require such witnesses to attend court in the requesting state where the criminal proceeding is pending. Obtaining custody of a defendant is an empty victory if the state cannot obtain the witnesses with which to prosecute him.

Every one of the forty-three jurisdictions which have adopted said uniform law has a vital stake in the outcome of this case and in the determination of whether they may constitutionally continue to make witnesses available to each other for use in criminal proceedings, as a matter of comity and under the authorization of said uniform law.

The several states cannot protect their internal security against criminals unless they can procure necessary witnesses who have fled to or are otherwise domiciled in other states. Such witnesses not being charged with crime, they cannot be extradited as criminals under the federal law or under the state law. The only way that their presence can

be procured is under and by virtue of the uniform law here under consideration.

Moreover, organized crime has no conscience and it usually has a well padded bankroll. If said uniform law should be cast into the discard as unconstitutional, organized crime would not hesitate to avail itself of the hiatus in the law by shuttling essential witnesses across state lines and then thumbing its nose at the state authorities with impunity, fully aware that no conviction could ever be obtained without procuring the personal presence of such witnesses in the state wherein the criminal proceedings are pending.

It cannot be successfully denied that it is imperative that the states have the right to exchange witnesses in criminal proceedings, and said uniform law is the only method in existence whereby such exchanges may be made.

In most states a person accused of crime has the right to confront the witnesses against him face to face. It is a common law right (23 C.J.S. 360, Criminal Law, Section 999). It is secured by the Constitutions of all except a small number of the states, while in some of the other jurisdictions the right is purely statutory (14 Am. Jur. 890-891, Criminal Law, Section 178). It is therefore not legally possible in most states for the prosecution to use the deposition of an absent witness against the accused at his trial. Nor does the law of many of the states permit the use of depositions in preliminary proceedings such as grand jury investigations. Even if all of the states permitted use of depositions in grand jury investigations of crime, that would do no more than enable the states to procure an indictment; it would be of no help to the states in trying the defendant for the offense charged in the indictment. In view of the practically uni-

versal confrontation rule, the states must have available to them some such method of exercising comity between themselves as is provided by said uniform law if they are to be able to preserve their internal security against criminals.

Although we find no decision by this Court of either of the federal questions here presented, the case of *Kentucky v. Dennison*, 24 How. 66, recognized that the states have the sovereign power to provide for the internal security of each of them, and to promote concord and harmony among all of them by mutually supporting each other in bringing offenders to justice. We quote from this Court's opinion in that case as follows (text 101-102):

> *"Indeed, the necessity of this policy of mutual support, in bringing offenders to justice, without any exception as to the character and nature of the crime, seems to have been first recognized and acted on by the American Colonies;*
>
> • • • •
>
> *"And when these Colonies were about to form a still closer union by the present Constitution, but yet preserving their sovereignty, they had learned from experience the necessity of this provision for the internal safety of each of them, and to promote concord and harmony among all their members; and it is introduced in the Constitution substantially is the same words,* but substituting the word 'crime' for the words 'high misdemeanor,' and thereby showing the deliberate purpose to include every offense known to the law of the State from which the party charged had fled.
>
> "The argument on behalf of the Governor of Ohio, which insists upon excluding from this clause

new offenses created by a statute of the State, and growing out of its local institutions, and which are not admitted to be offenses in the State where the fugitive is found, nor so regarded by the general usage of civilized nations, would render the clause useless for any practical purpose. For where can the line of division be drawn with anything like certainty? Who is to mark it? The Governor of the demanding State would probably draw one line, and the Governor of the other State another. And if they differed, who is to decide between them? Under such a vague and indefinite construction, the article would not be a bond of peace and union, but a constant source of controversy and irritating discussion. *It would have been far better to omit it altogether, and to have left it to the comity of the States, and their own sense of their respective interests, than to have inserted it as conferring a right, and yet defining that right so loosely as to make it a never failing subject of dispute and ill-will.*" (Emphasis supplied).

And we point out that in *Innes v. Tobin,* 240 U. S. 127, (affirming *Ex parte Innes,* Texas, 173 S. W. 291), this Court upheld the right of the State of Texas to surrender, under a Texas statute, one charged with crime in Georgia even though the accused was not extraditable under the federal laws and even though Texas' power to enact that statute did not derive from the United States Constitution or statutes.

Since the power of a state to prosecute criminals and to preserve its internal security against them is in many instances utterly dependent upon procuring necessary witnesses from other states, we submit that the several states have just as much sovereign power to enact reciprocal legis-

lation under which witnesses in criminal proceedings may be procured from other states as Texas had to enact legislation providing for the surrender of persons charged with crime who could not be extradited under federal law. And we further submit that the privileges and immunities clauses of Section Two of Article IV of the United States Constitution and the Fourteenth Amendment thereto are no more violated by said uniform law than they were violated by the Texas statute considered in *Innes v. Tobin, supra.*

The decision of the Supreme Court of Florida is the only decision of a state court of last resort which has passed upon the constitutionality of said uniform law in the light of the privileges and immunities clauses of the United States Constitution. A denial of certiorari would mean that Florida could not make witnesses available to other states which have enacted said uniform law and, the said law being reciprocal in its operation, such a denial would also mean that Florida could not procure witnesses from other states which have enacted said uniform law. Moreover, if this Court should deny certiorari, leaving unresolved by this Court the federal questions here presented, the decision of the Supreme Court of Florida would cast a cloud over the operation of said uniform law in other states in which its constitutionality has not been ruled upon. It is not improbable that some states would follow Florida's lead, and hold said uniform law unconstitutional, while others would decline to do so and would hold said law constitutional, with resultant confusion and substantial impairment of the operation of said uniform law.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

RICHARD W. ERVIN
Attorney General of Florida

REEVES BOWEN
Assistant Attorney General of Florida

FRANK S. HOGAN
District Attorney
New York County, New York
Counsel for Petitioner.

APPENDIX "A"

Opinion and Order of Circuit Court of
Dade County, Florida

IN THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR DADE COUNTY. CRIMINAL.

NO. 1719

In the Matter of	)	
	)	
The Application of the	)	
People of the State of	)	
New York for an Order	)	
Requiring One	)	
	)	
JOSEPH C. O'NEILL	)	**OPINION AND ORDER**
	)	
to attend and testify	)	
before the Grand Jury of	)	
the County of New York,	)	
State of New York.	)	
	)	

HOLT, Circuit Judge:

This is an application by the People of the State of New York for an Order requiring Joseph C. O'Neill to attend and testify before the Grand Jury of New York County, New York, pursuant to Chapter 942, Fla. Statutes 1955, the "Uniform Law to Secure the Attendance of Witnesses from within or without a State in Criminal Proceedings," which, for the sake of brevity, will hereafter be referred to as "The Uniform Law," which was adopted in this state in 1941.

On April 23, 1956, an Assistant District Attorney in and for New York County, New York, filed in the above entitled cause a Certificate of a Judge of the Court of General Sessions of the County of New York, supported by an affidavit of an Assistant District Attorney of said County, certifying that there was then pending in said court a criminal investigation by the Fourth November 1953 Grand Jury of said County entitled "The People of the State of New York v. John Doe," and that a certain Joseph C. O'Neill, then within Dade County, Florida, was a necessary and material witness for the State of New York in said criminal proceeding being conducted by said Grand Jury, and requesting that said Joseph C. O'Neill be taken into immediate custody and delivered to an officer of the State of New York to be conveyed to New York in order to assure his attendance as a witness before said Grand Jury. Upon presentation of said Certificate, this Court issued an attachment for said Joseph C. O'Neill. and a rule directed to him to show cause why an Order should not issue to take him into immediate custody and deliver him to an officer of the State of New York to assure his attendance in New York.

Joseph C. O'Neill was forthwith seized and arrested upon said Attachment and Rule to Show Cause, and brought before this Court in custody, and through his attorney, he requested time to review said matter upon which said Attachment and Rule to Show Cause was based, and to file a response to said Rule to Show Cause. This Court fixed bail at $2500.00, and allowed him time within which to file his response to said Rule to Show Cause. Thereafter, said Joseph C. O'Neill filed his response to said Rule to Show Cause and Motion to Quash, and this matter or cause came on to be heard on June 18, 1956, upon said Certificate of said Judge of the Court of General Sessions of New York County, New

York, and said Rule to Show Cause issued thereon, and the response, and Motion to Quash same filed by, and on behalf of said Joseph C. O'Neill, who appeared in person and by counsel, the applicant being represented by Honorable Francis X. Clark, an Assistant District Attorney in and for the County of New York, assigned to the Rackets Bureau of the District Attorney's Office.

By his response to said Rule to Show Cause, said Joseph C. O'Neill objected to the entry of any Order that he be taken into immediate custody, or that he be delivered to an officer of the State of New York, upon the ground that said "Uniform Law," Sections 942.01 to 942.06 Fla. Statutes 1955) was unconstitutional and void, in that same was in contravention of certain provisions of the Constitution of the United States, and the Constitution of Florida, and that no sufficient showing had been made that he was or is a necessary, and material witness in said criminal proceeding, and other reasons, which will be noted hereinafter. Said matter was fully argued by counsel for the respective parties, and the argument was reported, transcribed, and submitted to the Court, together with briefs by counsel for the respective parties, all of which have been fully considered by the Court.

The "Uniform Law," first adopted by the National Conference of Commissioners on Uniform State Laws, in 1931, (See Note: 24 FSA 288), in point of fact is "Uniform" in name only, and in its general over-all outline, because almost every state which has adopted it, has made changes in its text. Although 25 years have elapsed since it was first proposed for adoption by the States and although it has been adopted in somewhat different form by 42 States and the Territory of Puerto Rico (See: 9 U.L.A. Supp. 33),

there appear to be only eleven (11) reported decisions, listed in the Appendix to this Opinion, in which it has been considered, construed, or passed upon in any way; and none of those eleven decisions has considered or passed upon Sub-Section (3) of Section 942.02 Fla. Statutes, which is sought to be invoked in this proceeding.

The "Uniform Law" (Sections 942.01 to 942.06 Fla. Stat. 1955) appears to provide for two methods by which a witness may be compelled to appear and testify as a witness in another State. *First,* by the issuance of a "summons * * * directing the witness to attend and testify in the Court" of the other State, as provided in Sub-Section (2) of Section 942.02; in other words, by the issuance of a witness subpoena by a court of record of this State, directed to the witness, requiring him to go to another State, and appear and testify in the Court of such other State. *Second,* by the issuance or entry of an Order, provided by Sub-Section (3) of Sec. 942.02, that the witness be taken into immediate custody and delivered to an officer of the requesting State to be taken as a prisoner to the State where his attendance is desired as a witness. The Certificate which is the basis for this application, seeks to invoke the second method; that is, it recommends the immediate seizure of O'Neill, and his immediate delivery to officers of the State of New York.

The briefs filed by counsel for the Applicant and counsel for the Respondent, have not cited a single reported case in which any Court has considered or passed upon the constitutionality of the particular sub-section of the "Uniform Law" (Sub-Section (3) of Sec. 942.02 Fla. Statutes), except In Re ALLEN (a) 1940, 49 Par. D. & C. 631, in which the Court, after fully considering the constitutionality of the Act, held it unconstitutional, and expressly held (Text 642-

644) that the Section attempting to provide for the immediate seizure of the witness and his immediate delivery to officers of the requesting State, is unconstitutional. The only other reported decision which refers to that particular Sub-Section of the Act is U. S. vs. MONJAR (Del. 1946) 154 F. 2d 954, 170 A.L. R. 327, in which the Court merely refers to said Sub-Section, and holds that it should not be invoked against the Clerk of the United States District Court for the District of Delaware.

There appear to be only three reported decisions which have considered the constitutionality of the "Uniform Law," two in New Jersey, and one in Pennsylvania. In *Re ALLEN*, supra, decided in 1940, is the earliest of the three decisions, and in a well considered, well supported decision, the court held said Act unconstitutional because: (1) It violates the Fourteenth Amendment to the Constitution of the United States, which forbids any State to make or enforce any law which abridges the privileges and immunities of citizens of the United States; (2) violates the clause in the Fourteenth Amendment to the Constitution of the United States, which provides that no State shall deprive any person of life, liberty, or property, without due process of law; and (3) violates the Constitutional guaranty that the people shall be secure in their persons from unreasonable searches and seizures. In Re COOPER, 127 N.J.L. 312, 22 A. 2d. 532, decided in 1941, is the next case in which the constitutionality of said Act was considered, but the question does not appear to have been fully presented; nor does it appear to have been fully considered or decided, and in that case, the provision authorizing the immediate seizure of the witness, and his immediate delivery to the officers of the requesting State (Sub-Section (3) Sec. 942.02 Fla. Sta-

tutes) was not involved or considered. The third case, In Re SAPERSTEIN, 30 N. J. Super. 373, 104 A. 2d. 842, cert. den. 75 S.Ct. 110, 348 US 874, 99 L. Ed. 688, decided in 1954, primarily dealt with the question whether the "summons" or subpoena provided for by the Act (Sub-Section (2) Sec. 942.02 Fla. Statutes) authorized a subpoena duces tecum, and the provision relied upon in the case before the Court, Sub-Section (3), Sec. 942.02 Fla. Statutes, was not involved. The only point considered, so far as constitutionality of the Act was concerned, was whether it constituted a "compact" between states, in violation of the third clause of Section 10, Article I, of the Constitution of the United States, and the Court held that it did not constitute such a "compact." Thus, in the only three cases in which the constitutionality of the "Uniform Law" has been considered, it has been held unconstitutional in one, and in the other two, its constitutionality does not appear to have been carefully or thoroughly argued, considered, or decided, but, in the only case (In Re Allen, supra) in which the constitutionality of Sub-Section (3) of Sec. 942.04, Fla. Statutes, has been considered, it was held unconstitutional. In view of the fact that the constitutionality of the "Uniform Law" has been considered in only three cases during the 25 years which have passed since it was first proposed, and by the courts of only two out of the 42 States which have enacted said law (i. e., Pennsylvania and New Jersey), it can hardly be said that its constitutionality is settled. Two other cases have been cited, bearing upon the constitutionality of the Act under consideration: In Re COMMONWEALTH OF PENNSYLVANIA, 90 N.Y.S. 808, decided in 1904, and COMMONWEALTH OF MASSACHUSETTS v. KLAUS, 145 App. Div. 798, 130 N. Y. S. 713, decided in 1911. The "Uniform Law" was adopted by the National Commissioners on Uniform State Laws in 1931,

twenty years *after* the decision in the Klaus case, and twenty-seven years after the decision of the case in 90 NYS 808, both of which involved Section 618-a of the New York Code of Criminal Procedure, undoubtedly a forerunner of the "Uniform Law," but which did not contain any provision similar to sub-section (3) of Sec. 942.02 Fla. Statutes. It is also worthy of note that neither of those cases was decided by the highest court of the State of New York, and in the first (In re COMMONWEALTH OF PENNSYLVANIA, 90 N.Y.S. 808), the Court held said Act to be unconstitutional, while in the second (COMMONWEALTH v. KLAUS, 130 N.Y.S. 713), said Act was held constitutional by a divided court, with a well-considered, vigorous dissent. In conclusion, it may be said that the constitutionality of the "Uniform Law" (Sections 942.01 to 942.06 Fla. Statutes) is not settled, but appears to be in grave doubt.

In considering this case, it must be borne in mind that Joseph O'Neill is not under indictment in the State of New York, and it is not contended that he is a fugitive from justice so as to make him subject to extradition pursuant to the Uniform Interstate Extradition Law, Sections 941.01 to 941.37 Fla. Statutes 1955, or under the Federal Criminal Extradition Statute (Sections 3181 to 3195, Title 18 U.S.C.A.) expressly authorized by Section 2 of Article IV of the Constitution of the United States. It appears without question in this case that Joseph O'Neill is a citizen of Illinois, and that he resides, and has his home, and office or place of business in that state. He came into the State of Florida on or about April 23, 1956 for a few days' sojourn in connection with a convention which he was attending. He is not charged with having violated any law of the State of New York, or the State of Florida, or any other State.

It is settled beyond controversy or debate that the Courts of Florida have no jurisdiction to issue process running beyond the territorial limits of this State, and have no jurisdiction over persons, or property beyond the territorial limits of the State of Florida. "A court created within a sovereignty is necessarily limited as to its sphere of direct action on persons and things, real estate and chattels within that sovereignty." Hotchkiss vs. Martin (Fla) 52 So. 2d. 113. Process of one State has no force or validity within the territorial limits of another State, and cannot run beyond the territorial limits of the State. Passett v. Chase, 91 Fla. 522, 107 So. 689. A court created within and for a particular territory is limited in its jurisdiction to such territory, and no judicial process has any force outside such limits. Phillips v. State, 75 Fla. 93, 77 So. 673. "A warrant of arrest issued in one State may not be executed in another State, for it has no validity beyond the boundaries of the State by whose authority it was issued." *3 Fla. Jur. Arrest. p. 55.* It has been settled ever since Pennoyer v. Neff, 95 US 714, 24 L. Ed. 565, that the Legislature of a State cannot authorize process running beyond the territorial limits of the State. Under the authorities cited, it is clear that the Legislature of this State has no constitutional power to confer jurisdiction upon the Courts of this State to issue process running beyond the territorial limits of the State of Florida, and that is the effect of sub-section 1 of Section 942.02 Fla. Statutes 1955. Just as the Legislature of this State is powerless to confer jurisdiction upon this Court to issue witness subpoena or other process running into Georgia, Alabama, or any neighboring State, it is likewise powerless to confer jurisdiction upon this Court to issue witness subpoena or other process running into other States, such as New York. If a witness subpoena were issued

by this Court commanding a witness to appear before a court of the State of New York, such process would be of no force and effect as compulsory process. Insofar as Subsection 1 of Section 942.02, Fla. Statutes, 1955, attempts to confer any such power, authority, or jurisdiction upon any court of record of this State, it is unconstitutional, void, and of no effect. Passing for the moment, the fact that the Legislature of this State is powerless to confer upon this, or any other Court of the State of Florida, jurisdiction to issue process running beyond the limits of the State, Section 942.02 Fla. Statutes 1955 also violates the Fourteenth Amendment to the Constitution of the United States in that it abridges the privileges and immunities of citizens of the several states, since it impairs the right of free ingress and egress from state to state, which is one of the rights of national citizenship guaranteed by the Fourteenth Amendment to the Constitution of the United States. Edwards v. California, 314 US 160, 62 S. Ct. 164, In Re Allen, supra; Commonwealth v. Klaus, supra, and Commonwealth v. Pennsylvania, supra.

Perhaps the most serious objection to the constitutionality of the "Uniform Law (Sections 942.01 to 942.04 Fla. Statutes) is found in the provisions of Sub-Section (3) of Sec. 942.02, which attempts to authorize a court of this State to order a citizen not charged with the commission of any crime, or even suspected of having committed any crime, to "be taken into immediate custody and delivered to an officer of the requesting State" or, "in lieu of issuing subpoena or summons, order that such witness be forthwith taken into custody and delivered to an officer of the requesting State." This sub-section makes no provision for bail, and if followed literally, does not contemplate or permit

bail, but attempts to authorize any court of record to order a citizen to be arrested, seized and held without bail, and to be delivered, without bail, to an officer of the requesting State to be carried away against his will as a prisoner to another State. Neither counsel has cited any reported case holding this sub-section of the Act under consideration constitutional. This Section was merely mentioned in passing in U. S. v. Monjor (Del. 1946) 154 F. 2d 954, 170 ALR 327, with the observation that should a subpoena be issued to the Clerk of the United States Court for the District of Delaware, he should not be subjected to the provisions of that Section. In the case of In Re: ALLEN, supra, the Court held that the failure of this Section to provide for bail rendered the Act unconstitutional. The Court, in discussing this subject (Text 643-644), said:

> "The Statute under consideration with its provisions for taking a witness into custody and delivering him bodily over to authorities from a foreign jurisdiction is, in our opinion, clearly unreasonable and unwarranted. A person charged with a crime can be taken from one State to another in order that he may be punished for the crime. It is significant that the clause in the Federal Constitution which reads as follows: "A person charged in any State with Treason, Felony, or other crime, who shall flee from Justice, and be found in another State, shall on Demand of the Executive Authority of the State from which he fled, be delivered up to be removed to the State having jursidiction of the Crime;" is part of Section 2 of Article IV of the Federal Constitution, and it immediately follows and thus qualifies the opening sentence of that section which guarantees to the citizens of each State all the privileges and immunities of citizens in the several States."

"The authority for extradition is found in the Federal Constitution and the Federal Statutes passed pursuant thereto. See R. S. par. 5278, 18 U. S. C. Par. 662. Roberts v. Reilly, 116 U. S. 80 94 (1885), and Innes v. Tobin, 240 U. S 127, 131 (1916). It would seem that if it required a provision of the Federal Constitution to provide for the compulsory transfer of a person charged with a crime from one State to another, a fortiori, an Act for the compulsory transfer of an innocent person from one State to another for the purpose of giving viva voce testimony should have like express constitutional authority, and that the Act should permit the proposed witness to enter his recognizance as in extradition proceedings. A fugitive from justice or a person in this State charged with a crime in another State is allowed to enter bail unless the crime with which he is charged is punishable by death or life imprisonment; Act of April 2, 1927, P. L. 327, Sec. 16. Surely, it is not due process of law to protect the liberty of criminals and fugitives from justice to a greater degree than the liberty of honest and law-abiding citizens of this State."

The right to bail in Florida is not a mere "privilege," which may be denied in the Court's discretion. The right to bail is absolute, unless the person is charged with a capital offense, and even then, he is entitled to bail unless the proof of guilt is evident or the presumption great. Ex Parte McDaniel, 86 Fla. 145, 97 So. 317; Bozovichar v. State, (Ind.) 103 N. E. 2d 680; Section 9, Declaration of Rights of the Constitution of Florida. The right to bail under the Constitution of the United States, and other States is almost universal and unrestricted, except in capital cases where the proof of the prisoner's guilt is evident or the presumption of his guilt is great. See: Sec. 5, Bill of Rights

of the Constitution of New York: Eighth Amendment to the Constitution of the United States. "A denial of such right is a deprivation of liberty without due process of law." 3 Fla. Jur. Bail and Recognizance, p. 37-38.

Sub-section 3 of Section 942.02 Fla. Statutes, invoked by the applicant in this case, is clearly unconstitutional and void, and the application for an order to take Joseph O'Neill into immediate custody must be and is hereby denied.

Sub-Section 2 of Section 942.02 Fla. Statutes requires that this Court determine that the witness is "material and necessary." Neither the Certificate, nor the affidavit upon which it is based, set forth any *facts* from which this Court can determine that O'Neill is a "material and necessary" witness before the Grand Jury, and the showing made in that respect is no stronger than the showing made in the Application of Stamler, (NY 1952) 279 App. Div. 908, 111 NYS 2d. 313, in which the State of New Jersey sought a subpoena order to require Frank Costello to appear and testify as a witness in a criminal proceeding in that State. In that case, the Court said:

> "Section 618-a of the New York Code of Criminal Procedure contemplates, at the very least, that the Court of the demanding State shall have passed on the question whether the testimony will be material in the prosecution pending in that State. Whether a mere statement that the witness is a material witness would be sufficient without further recital of the charge and the facts upon which the finding of materiality was based, we do not need now to pass upon. At least upon the certificate produced in this case it was improper for the Judge of the Court of General Sessions to grant the

subpoena-order without any proof of the materiality of the testimony of the Order."

In State v. Blount (Ore. 1954) 200 Ore. 35, 264 P. 2d. 419, cert. den. 74 S. Ct. 711, 347, U. S. 962, 98 L.ED. 1105, the Oregon Court held that the showing of the facts required by the "Uniform Law" to show that the witness is "material and necessary", should at least be as great as the showing required in order to obtain a continuance upon the ground of the absence of a material witness, and that it must appear from a statement of the *facts* that such witness is "material and necessary", and that a mere statement to that effect is insufficient. In State v. Foquette (Nevada 1950) 67 Nev. 505, 221 P. 2d. 404, cert. den. 71 S. Ct. 799, 341 US 932, 95 L. Ed. 1361; 72 S. CT. 369, 342 US 928, 96 L.ED. 691, the Court again held that under the Act in question the facts must be stated to show that such a witness is both material and necessary. It is well settled in Florida that in order to secure a continuance upon the ground of the absence of a material witness, the applicant must state the *facts* to which such witness would testify, in order that the Court may determine from the *facts* that the testimony of the absent witness is material and necessary. Harrell v. Durrance, 9 Fla. 490; Reynolds v. Smith, 49 Fla. 217, 38 So. 903. Tested by this Rule, the certificate and the affidavit upon which this application is based fall far short of any showing that Joseph O'Neill is a "material and necessary witness" in any proceeding pending in New York. It is a safe rule that in any proceeding in which an application for the seizure of any person is sought, the application should state the *facts* upon which such application is based. Section 22 of the Declaration of Rights of the Constitution of Florida guarantees the right of the people to be secure

in their persons, houses, papers and effects against unreasonable searches and seizures, and that no warrants shall be issued but upon probable cause supported by oath and affirmation. Warrants for the arrest of any person can only be issued in this State upon oath indicating a probable violation of the law. Sec. 901.02 Fla. Statutes, 3 Fla. Jur. Arrest, pp48-49; Conrad v. Van Buren, Cir. Judge, 144 Mich. 492, 108 NW 347. Neither the affidavit, nor the certificate upon which this application is based set forth any *facts* from which it is made to appear that Joseph O'Neill is a "material and necessary witness", and in the absence of such a showing, this Court is not authorized to issue any summons, or subpoena, and the mere statement of a conclusion that he is a material or necessary witness is insufficient. Application of Stamler, supra; State v. Blount, supra; State v. Foquette, supra.

Upon consideration of the application of the People of The State of New York, the Court is of the opinion that said Application should be denied, and this proceeding dismissed, and therefore, it is

CONSIDERED, ORDERED, AND ADJUDGED, as follows:

1. That the **Motion** of JOSEPH O'NEILL **to quash** and discharge the Rule to Show Cause issued in the above-styled cause, and directed to him, be and the same is hereby granted, and said Rule to Show Cause is hereby quashed and discharged, and said JOSEPH O'NEILL is hereby discharged from custody thereunder.

2. That JOSEPH O'NEILL, and the surety upon his

bond posted pursuant to said Rule to Show Cause be, and they and each of them are hereby discharged of all liability thereunder.

3. That the attachment issued in the above styled cause for the arrest of said JOSEPH O'NEILL, described therein as Joseph C. O'Neill, be and the same is hereby quashed, and dismissed, and the application of the People of the State of New York for an Order requiring said JOSEPH O'NEILL, named and described therein as Joseph C. O'Neill, be and the same is hereby dismissed, with prejudice and at the cost of said applicant.

DONE AND ORDERED in the City of Miami, Dade County, Florida, this 20 day of July, 1956.

GEORGE E. HOLT
Circuit Judge

APPENDIX

(1) People V. Parker
(N. J. - 1936) 16 N. J. Misc. 471
1 A. 2d. 54.

(2) In Re Cooper
(N. J. - 1941) 127 N.J.L. 312
22 A. 2d. 532

(3) In Re Saperstein
(N. J. - 1954) 30 N.J. Super. 373,
104 A. 2d. 842,
Cert. Den. 75 S. Ct. 110
348 U. S. 874, 99 L. ED. 688

(4) U. S. v. Monjor
(Del. 1946)
154 F. 2d. 954.

(5) Application of Stamler
(N. Y. 1952) 279 App. Div. 908
111 NYS 2d. 313.

(6) State v. Blount
(Ore. 1954) 200 Ore. 35,
264, P. 2d. 419,
Cert. Den. 74 S. Ct. 711,
347 US 962, 98 L. ED. 1105

(7) State v. Foquette
(Nev. 1950) 67 Nev. 505,
221 P. 2d. 404,
Cert. Den. 71 S. Ct. 799,
341 U. S. 932, 95 L.ED. 1361,
72 S.Ct. 369, 342 US 928,
98 L.ED. 691

(8) Vore v. State
(Neb. 1954) 158 Neb. 222,
63N. W. 2d. 141

(9) People v. Simon
(Cal. 1951) 107 Cal. App. 2d. 105,
236 P. 2d. 855,
Cert. den. 72 S.Ct. 645,
343 US 911, 96 L.ED. 1327

(10) State ex rel Butler v. Swenson,
(Minn. 1954)
66 N. W.2d, 1

(11) In re Allen
(Pa. 1943)
49 Pa. D & C. 631.

Filed this 20th day of July, A. D. 1956 and recorded the 23rd day of July A. D. 1956, in Circuit Court Minute Book 305, Page No. 145.

E. B. LEATHERMAN
Clerk Circuit Court

By G. Boyer, Deputy Clerk

APPENDIX "B"

Opinion of Supreme Court of Florida.

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1958

IN RE: THE APPLICATION OF	**	
THE PEOPLE OF THE STATE	**	
OF NEW YORK FOR AN OR-	**	
DER REQUIRING ONE	**	
JOSEPH C. O'NEILL	**	CASE NO. 28,978
TO ATTEND AND TESTIFY BE-	**	
FORE THE GRAND JURY OF	**	
THE COUNTY OF NEW YORK,	**	
STATE OF NEW YORK.	**	

Opinion filed January 22,1958

An Appeal from the Circuit Court for Dade County, George E. Holt, Judge

Richard W. Ervin, Attorney General, Reeves Bowen, Assistant Attorney General and Frank S. Hogan, District Attorney, New York County, (New York, N. Y.) for Appellant

L. J. Cushman, for Appellee

THOMAS, J.:

On 23 April 1956 there was filed in the Circuit Court of Dade County, Florida, the certificate of Honorable Mitchell D. Schweitzer, Judge of the Court of General Sessions of the State of New York, reciting that he had read

an affidavit signed by an Assistant District Attorney of the County of New York, recommending that one Joseph C. O'Neill be taken into custody and delivered to an officer of the State of New York to assure his attendance there and that the witness, O'Neill, be brought immediately before the Florida court for hearing on the matter of extradition.

It was stated in the certificate that the District Attorney had been conducting before a grand jury an investigation of the use of funds of certain labor unions and the activities of union officials in the handling of such monies. The grand jury was undertaking to determine whether or not union officials and representatives had conspired to steal funds belonging to the unions in violation of Secs. 580 and 1290 of the Penal Law of New York.

In the certificate O'Neill was designated a material and necessary witness in the investigation. He was described as General President of the Distillery, Rectifying, Wine and Allied Workers' International Union of America, Chairman of the Executive Board, and Chairman of the Social Security Department which administers the welfare fund of the union. The grand jury purposed to learn from him about disposition of the union's funds.

According to the judge's certificate efforts to procure the attendance of O'Neill had been unsuccessful and he had refused to appear voluntarily and testify. Inasmuch as he resided in Illinois, in which no reciprocal witness statute has been enacted, the office of the District Attorney could not compel his presence.

Continuing, it was stated that the District Attorney learned that a convention of the union would be held in Miami 23 April 1956 and that under the constitution of the union the president, O'Neill, was required to be present and preside.

By the certificate O'Neill was assured of protection from arrest or service of civil and criminal process in connection with matters arising before his entrance into New York should he appear under court order.

We see no occasion to give a summary of the statements in the affidavit of the Assistant District Attorney as they seem harmonious with the ones appearing in the judge's certificate which contains sufficient information for determination of the points in controversy.

There was incorporated in the affidavit the request that the court under Sec. 618-a of the New York Code of Criminal Procedure issue the certificate we have described.

Upon the filing of the certificate in the Circuit Court of Dade County the judge ordered the sheriff to attach O'Neill and bring him forthwith before the court to show cause why an order should not immediately issue for his custody and his delivery to an officer of the State of New York. Evidently the same day the certificate was filed O'Neill was apprehended and gave bond, although there is no provision in our statute, Sec. 942.02, Florida Statutes 1955, for such a bond.

A month later O'Neill filed a response and after another month had passed a hearing was held by the circuit

judge when arguments of Assistant District Attorneys from New York and O'Neill's counsel were presented but at which no testimony was taken. Subsequently the judge, basing his opinion on the record, concluded that Sec. 942.02, supra, was unconstitutional because by it the state was given extraterritorial jurisdiction, the right of ingress and egress across the state line was impaired and the witness could be taken into custody here and delivered into custody of an officer of another state without bail. Also, the judge thought the certificate of the Judge of the Court of General Sessions of New York and the affidavit of the Assistant District Attorney did not depict a situation showing that O'Neill was a material and necessary witness.,

We dismiss the last point with the observation that it is plain to us O'Neill is a material and necessary witness in the investigation of the misuse of funds of the union. By the terms of the act, the certificate of the judge must be taken as "prima facie evidence of all the facts stated therein." It may be logically deduced that because of the positions held by O'Neill he is familiar with the funds of the organization if, indeed, he does not supervise or control them, and we think that in an investigation of the administration of those funds he would prove a material and necessary witness.

It is stated in the brief of the Attorney General that the "appellant" filed a notice of appeal and filed "its" assignments of error and "its" directions to the clerk.

Upon an examination of the record, we find that the notice of appeal was filed by "THE APPLICANT, the People of the State of New York" and that it, the assign-

ments of error and the directions to the clerk, carried the names of the District Attorney of New York County, the Attorney General of Florida, the State Attorney of the Eleventh Judicial Circuit and an Assistant State Attorney but were signed only by the Assistant State Attorney. On the notice of appeal these officers were described as attorneys for "applicant" and on the assignments of error and directions to the clerk, as attorneys for "appellant".

Soon after the appeal was lodged here the attorney for Joseph C. O'Neill moved to dismiss it, and the members of the court sitting at the time deferred a ruling until hearing of the cause on the merits.

We have now reconsidered the motion and have concluded we should proceed to a determination of the dispute on the merits, that is, the adjudication of the validity of Sec. 942.02, supra. The motion was based on the ground that this court had no jurisdiction because the order attempted to be reviewed was entered in a criminal proceeding and the state had no right to appeal except from orders specified in Sec. 924.07, Florida Statutes 1955, of which the order of the circuit judge was not one, and further that the People of the State of New York had no right of appeal. The Attorney General countered on the ground that the case was a civil proceeding and asked this court to consider the appeal a petition for certiorari, under Sec. 59.45, Florida Statutes 1955, if it appeared that the appeal had been improvidently taken.

We agree with the Attorney General that the proceeding is not criminal and that appeal was the proper method of review as, by Sec. 5 of Art. V of the Constitution, this

court had "appellate jurisdiction in all cases at law * * * originating in Circuit Courts * * *." The case originated in the circuit court and the appeal was filed before the effective date of the amendment of Art. V adopted in November 1956.

The procedure followed by the Attorney General is rather unusual because the record does not show any participation by him until the circuit judge had ruled. His name first appears on the notice of appeal. But the State of New York, in our opinion, had the right to appeal as O'Neill would have had if the judgment had been unfavorable to him. The appeal became effective when the notice was filed by the District Attorney of New York County. The introduction of the Attorney General into the controversy was somewhat unorthodox but in view of the mandate in Sec. 22 of Art. IV of the Constitution that he "perform such other legal duties as may be prescribed by law" and the requirement of Sec. 16.01, Florida Statutes 1955, that he "appear in and attend to in behalf of the state, all suits or prosecutions, civil or criminal, or in equity, in which the state may be a party, or in any wise interested * * *" we will consider his entrance via the notice of appeal an effort to present the interest of the state in the preservation of the statute. This concern of the state in maintaining the validity of the law comes from the law's reciprocal nature. If the act is held unconstitutional, then, of course, the attendance here of witnesses residing in states having such a uniform act cannot be accomplished.

The act is known as the " 'uniform law to secure the attendance of witnesses from within or without a state in criminal proceedings,' " Sec. 942.06, Florida Statutes 1955, and F.S.A., and is "only applicable to such state as shall

enact reciprocal powers to this state relative to the matter of securing attendance of witnesses'' as provided in it. Sec. 942.05, Florida Statutes 1955. It was enacted in New York, Code of Criminal Procedure 618-a, supra.

We return now to the procedure outlined. If it is recommended in the certificate that the witness be taken into immediate custody and delivered to an officer of the state making the request, the judge may, instead of notification of the hearing, order the witness brought before him at once. Such a recommendation was made in this case and such an order was initially entered. It is provided in the act that if at the hearing the custody and delivery appear to the resident judge 'desirable', he may order the witness placed in custody and delivered to an officer of the state making the request.

Evidently The People of the State of New York intended by the certificate of the judge to coerce the attendance of O'Neill by one process or the other but preferred to have the witness taken into custody. When the circuit judge in Dade County entertained the certificate, two courses were available. He could have notified the prospective witness of a hearing to determine whether or not the witness should be subpoenaed to testify before the grand jury in New York. On the other hand, in view of the recommendation that the witness be taken into custody, the judge could have directed that the witness be immediately brought before him and then, if the judge was "satisfied of the desirability" that the witness should be placed in custody and delivered to an officer of the State of New York, he could have followed that procedure instead of issuing a subpoena.

The latter course seems to have been first chosen by the circuit judge, but upon hearing he decided not to put O'Neill in custody or place him under summons because of his conviction that the whole act was invalid.

In the circumstances it seems to be our obligation to decide the constitutionality of Sec. 942.02, supra, whether the procedure be to seize and deliver a witness or to place him under subpoena. We will discuss the two aspects in that order.

Certain salient facts should be remembered in judging the merits of the act as it would operate on O'Neill. He is not charged with crime. On the contrary, it is stated in the judge's certificate that the laws of New York would guarantee O'Neill, if taken there pursuant to this proceeding, protection from arrest and the service of criminal process. Parenthetically, this assurance was given in the certificate but it is extremely doubtful if the act itself provides for such a safeguard, except in the case where a summons is issued as distinguished from seizure and delivery of the witness.

Although the uniform law was adopted by The National Conference of Commissioners on Uniform State Laws more than a quarter-century ago, and, incidentally, enacted by this State in 1941, there is a dearth of judicial decision on its operation and validity.

It appears from the opinion of the circuit judge and the brief filed by the appellee that but one court has passed directly upon the provisions of the act attempting to authorize the summary procedure, namely, a District and County Court of Pennsylvania in In Re Allen, 49 Pa. D & C 631.

The court seems to have primarily considered the title of the act under attack, but it did declare the provisions for seizure of a witness and his delivery to the officer of a foreign state invalid because they violated Sec. 2 of Art. IV and the privileges and immunities provision of the Fourteenth Amendment of the Federal Constitution. The Constitutionality of the uniform act was considered in In Re Cooper, 127 N.J.L. 312, 22 A.2d 532, and in In Re Saperstein, 30 N.J. Super. 373, 104 A.2d 842, but in neither of these was the validity of the particular provisions for seizure and delivery of a witness specifically determined. In the former it was contended that the title of the act was not sufficient to make a witness for a defendant subject to its provisions with reference to the issuance of subpoenas. It is true that the provisions for seizure of a witness were assailed but clearly no attempt to invoke them had been made. In the latter decision the points presented were not the same as those we are considering.

By the Fourteenth Amendment of the Constitution of the United States the states are enjoined from making or enforcing "any law which shall abridge the privileges or immunities of citizens of the United States * * *." It also contains the guarantee that a state shall not deprive a person of liberty "without due process of law." And in the first paragraph of Sec. 2 of Art. IV of the Constitution is incorporated the guarantee that also seems immediately involved in the question whether or not a person who is not charged with crime of any sort may be restrained of his freedom because he is needed elsewhere as a witness in an investigation by a grand jury. Not only are the privileges and immunities of citizens of the United States placed beyond the power of the state to impair but citizens of each

state are vouchsafed the privileges and immunities of the citizens of all the states. The following paragraph of Sec. 2 of Art. IV gives emphasis to the preceding one and forms an exception to it for such privileges and immunities are not guaranteed to the person charged with "Treason, Felony, or other Crime" who flees from justice. The state to which he flees must deliver him up "on Demand of the executive Authority of the State from which he fled * * *."

We agree with the circuit judge that the right of O'Neill to ingress and egress would be impaired if not destroyed if the circuit judge were to order his seizure, as was 'recommended'. He would no longer have been allowed freely to pass from the State of Florida to another state but would have been taken to New York whether or not he wished to go there and he would have been prevented from returning to his home state of Illinois although it is quite clear that he came to this state for a visit of but a few days to attend a convention.

We think the provisions of the Fourteenth Amendment forbade the passage by the legislature of Florida of a law which would so interfere with the movement of a citizen of the United States who as a citizen of Illinois was privileged to move freely from his state to Florida and back. This privilege would have been nullified, of course, had he become a fugitive from justice which is not the case.

In Twining v. New Jersey, 211 U.S. 78, 29 S.Ct. 14, 53 L. Ed. 97, it was written: "Privileges and immunities of citizens of the United States, on the other hand, are only such as arise out of the nature and essential character of the national government, or are specifically granted or

secured to all citizens or persons by the Constitution of the United States. Slaughter-House Cases, supra, p. 79; Re Kemmler, 136 U.S. 436, 448, 34 L.ed. 519, 524, 10 Sup. Ct. Rep. 930; Duncan v. Missouri, 152 U. S. 377, 382, 38 L.ed. 485, 487, 14 Supt. Ct. Rep. 570. Thus, among the rights and privileges of national citizenship recognized by this court are the right to pass freely from state to state (Crandall v. Nevada, 6 Wall. 35, 18 L.ed. 745); * * *."

We think that operation of the statute in question would constitute a definite interference with the right of a citizen of the state and of the United States to move freely from one state to another, and we think of no better illustration than what would have occurred in this case had the circuit judge accepted the 'recommendation' and found it 'desirable' to send O'Neill to New York in custody. A Citizen of Illinois, comes to Florida for a brief visit; he is haled into court and confronted with an order placing him in custody of an officer who will conduct him to New York. His privilege of staying, or returning to his home in Illinois, or of going elsewhere, is brought to an end. It is difficult to imagine a harsher infringement of the right a citizen has to go from place to place which is a privilege, according to the expressions of the Supreme Court of the United States, secured to him under the Fourteenth Amendment.

O'Neill is entitled under Sec. 2 of Art. IV, supra, to all the privileges and immunities of all the citizens of all the other states so long as he has not committed crime for which he could be extradited. The power to remove him in this isolated situation is found in that section. The courts have held that this kind of extradition depends on the Constitu-

tion of the United States, People v. Hiatt, 172 N.Y. 176, 64 N.E. 825, and not on comity, courtesy or contract. Ex parte Thompson, 85 N.J. Eq. 221, 96 A.102.

We think the matter is purely one of conflict with the Federal Constitution; that the act violates the constitution, and consequently cannot be upheld.

Inasmuch as the circuit judge apparently could have put the witness under subpoena if he concluded against the "desirability" of placing him in custody and could have bound the witness to appear, or be held in contempt, and since the judge held the whole act unconstitutional and discharged O'Neill, we decide, too, the question of the validity of the law as it would be applied in the other instance.

It was the view of the circuit judge that the courts of this state were without power to issue process effective beyond the borders of the state. This general rule we understand is true. Passett v. Chase, 91 Fla. 522, 107 So. 689. Nor can civil process operate beyond the limits of the state so as to form a basis for a money judgment against one residing without although he has been made a party to the litigation by constructive service. Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565.

Because we believe, after careful study, that this feature of the law is unconstitutional, for the reasons we have given, we find no occasion to discuss the question whether or not it violates Secs. 9 and 12 of the Declaration of Rights of the Constitution of Florida and the Eighth and Fourteenth Amendments of the Constitution of the United States

because no bail is provided for persons attached and delivered into custody of an officer of another state.

We ask the rhetorical question: How, then can a Florida court enforce an order to appear before a court of another state when the operation of the order clearly extends beyond state limits? While any person is within the boundaries of this state he is subject to orders entered against him by courts properly exercising their jurisdiction, but it would be inconsistent with the decisions cited to hold that such a court could command a witness to appear in New York, send him on his way, then, if the witness did not appear in New York, punish him here for his failure there "in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state." It is not clear just what court would administer the punishment in the event of default because that part of the act provides that "he shall be punished" in the manner described. Conceivably his failure would be contemptuous of both courts. If the Florida court attempted to inflict punishment, it would be for failure to comply in New York; if the New York court undertook to inflict punishment, it would be for failure to obey a summons set in motion in Florida. Either way the Florida process would be operating extra-territorially.

The Attorney General concedes in his brief that the Supreme Court of the United States has held that among the privileges of American citizenship guaranteed by the Fourteenth Amendment is the right to pass freely from state to state, citing Twining v. New Jersey, supra. He takes the position that Sec. 2 of Art. IV has no application to the facts of this case because, as we understand it, the

statute, Sec. 942.02, does not discriminate between the citizens of Florida and the citizens of any other state. This would mean that O'Neill, a sojourner from Illinois, could be summarily put in custody or placed under subpoena, because any citizen of Florida could be treated the same way. To extend this argument the law would be valid because in those states that have adopted it any person could be placed in custody or put under subpoena, to coerce his appearance as a witness in any other state that had adopted the law.

This might be an answer to a charge of discrimination but it does not follow that if a law is invalid for some reason it should nevertheless be held good because, bad as it is, it affects all persons the same.

As we interpret the Fourteenth Amendment, the citizens of Florida and New York which have adopted the uniform law, may, as citizens of the United States, go where they please, and so may the citizens of Illinois and other states that have not enacted it. If, aside from the question now of discrimination, a citizen of a state having no such law, Illinois, travels to a state having it, Florida, and there is made subject to the law because another state, New York, thinks his presence there is 'desirable', it cannot be true that the right of all the citizens of all the states to move among them has not been impaired.

The Attorney General quotes liberally from the opinion in Commonwealth of Massachusetts v. Klaus, 130 N.Y.S. 713, decided by the Appellate Division of the Supreme Court of New York, and italicizes a statement in the opinion of that court that it was conceded in the brief "that the

right of free ingress and egress was never intended to enable a citizen of the United States to interfere with the orderly administration of justice within the territorial boundaries of the state" and that a citizen when "within the boundaries of a state" is amenable to the constitution and laws of that state and that the privileges and immunities clause affords him only protection against unjust discrimination. This concession, said the court, was a complete answer to the charge that a law, similar to the one before us, was unconstitutional. So this decision helps us little.

We are not able so easily to decide the matter before us for we do not think that Sec. 2 of Art. IV read with the pertinent part of the Fourteenth Amendment justifies the view that no rights are abridged if no discrimination is practiced.

The Attorney General argues that "[n]o power was delegated * * * to the United States to require free ingress and egress when to do so would defeat one of the primary purposes for which the state governments were instituted, viz., the protection of the people from *criminals.*" (Italics ours.) Nor does the Constitution prohibit the states from impairing the right of free ingress and egress to the extent required to protect themselves against *criminals.*

We do not find in the provisions of the law a basis for the position. The act refers to prosecutions and grand jury investigations but we have ascertained nothing in it with reference to restricting such testimony to use by the state in either. The procedure is inaugurated by a certificate of a judge of record of the requesting state that the person sought to be extradited "is a material witness *in*

such prosecution, or * * * investigation." We have supplied the italics. Furthermore, the preceding section, Sec. 942.01, Florida Statutes 1955, titled "Definitions" contains the following: "'Witness'—as used in this chapter [942], shall include a person whose testimony is desired *in* any proceeding or investigation by a grand jury or *in* a criminal action, prosecution or proceeding held by the prosecution *or the defense.*" (Italics ours.) So, evidently the procedure would be available to a defendant as well as the prosecution.

We realize that the right of ingress and egress is not absolute, for instance, the Fourteenth Amendment does not limit exercise by the state of the police power to protect the health, morals and general welfare of the people, Butchers' Union S.H. and L.S.L. Co. v. Crescent City L.S.L. and S. H. Co., 111 U.S. 746, 28 L. Ed. 585, 4 S. Ct. 652. But we do not discern in the present state of facts any of the elements of an exception.

The Attorney General concedes that circumstances might exist under which bodily delivery of a witness would be unreasonable and that "it was never intended to authorize the delivery of a witness * * * where the circumstances are such that it would be unreasonable to do so * * *." This statement is followed by the remark: "when the statute is thusly construed there is nothing unreasonable about it." In this connection we refer, again, to the procedure. If the judge of the demanding state certifies the 'desirability' of bodily delivery, it shall be prima facie evidence of the 'desirability' and the judge here may, if satisfied with the 'desirability', have the witness taken into custody. We cannot decide the constitutionality or unconstitutionality of the act under attack by simply saying that if the cir-

cumstances are reasonable there is nothing unreasonable about the act.

After a careful study of both features of the law, we are convinced that it is unconstitutional and that the circuit judge ruled correctly when he held it so.

Affirmed.

TERRELL, C. J., HOBSON, THORNAL and O'CONNELL, JJ., concur

APPENDIX "C"

Judgment of Supreme Court of Florida.

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM A. D. 1958

WEDNESDAY, JANUARY 22, A. D. 1958

IN RE: THE APPLICATION OF **
THE PEOPLE OF THE STATE **
OF NEW YORK FOR AN ORDER **
REQUIRING **
JOSEPH C. O'NEILL **
TO ATTEND AND TESTIFY BE- **
FORE THE GRAND JURY OF **
THE COUNTY OF NEW YORK, **
STATE OF NEW YORK **

This cause having heretofore been submitted to the Court upon the transcript of the order herein, and briefs and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said order; it is, therefore, considered, ordered and decreed by the Court that the said order of the Circuit Court be and the same is hereby affirmed; it is further ordered by the Court that the Appellee do have and recover of and from the Appellant his costs by him in this behalf expended, except the $12.00 filing fee which has been paid by the Appellant, and that all costs shall be taxed in the Court in which the appeal was entered, all of which is ordered to be certified to the Court below.

The Opinion of the Court in this cause prepared by Mr. Justice THOMAS was this day ordered to be filed.

APPENDIX "D"

SECTIONS 941.01 THROUGH 941.06, FLORIDA STATUTES, 1955

942.01 *Definitions.*—"Witness"—as used in this chapter shall include a person whose testimony is desired in any proceeding or investigation by a grand jury or in a criminal action, prosecution or proceeding held by the prosecution or the defense.

The word "state" shall include any territory of the United States and District of Columbia.

The word "summons" shall include a subpoena, order or other notice requiring the appearance of a witness.

942.02 *Summoning witness in this state to testify in another state.*—

(1) If a judge of a court of record in any state which by its laws has made provision for commanding persons within that state to attend and testify in this state certifies under the seal of such court that there is a criminal prosecution pending in such court, or that a grand jury investigation has commenced or is about to commence, that a person being within this state is a material witness in such prosecution, or grand jury investigation, and that his presence will be required for a specified number of days, upon presentation of such certificate to any judge of a court of record in the county in which such person is, such judge shall fix a time and place for a hearing, and shall make an order directing the witness to appear at a time and place certain for the hearing. The witness shall at all times be entitled to counsel.

(2) If at a hearing the judge determines that the

witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in the prosecution or a grand jury investigation in the other state, and that the laws of the state in which the prosecution is pending, or grand jury investigation has commenced or is about to commence (and of any other state through which the witness may be required to pass by ordinary course of travel), will give to him protection from arrest and the service of civil and criminal process, he shall issue a summons, with a copy of the certificate attached, directing the witness to attend and testify in the court where the prosecution is pending, or where a grand jury investigation has commenced or is about to commence at a time and place specified in the summons. In any such hearing the certificate shall be prima facie evidence of all the facts stated therein.

(3) If said certificate recommends that the witness be taken into immediate custody and delivered to an officer of the requesting state to assure his attendance in the requesting state, such judge may, in lieu of notification of the hearing, direct that such witness be forthwith brought before him for said hearing; and the judge at the hearing being satisfied of the desirability of such custody and delivery, for which determination the certificate shall be prima facie proof of such desirability may, in lieu of issuing subpoena or summons, order that said witness be forthwith taken in custody and delivered to an officer of the requesting state.

(4) If the witness, who is summoned as above provided, after being paid or tendered by some properly authorized person the sum of ten cents a mile for each mile by

the ordinary traveled route to and from the court where the prosecution is pending and five dollars for each day, that he is required to travel and attend as a witness, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state.

942.03 *Witness from another state summoned to testify in this state.*—

(1) If a person in any state, which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions, or grand jury investigations commenced or about to commence, in this state, is a material witness in a prosecution pending in a court of record in this state, or in a grand jury investigation which has commenced or is about to commence, a judge of such court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. Said certificate may include a recommendation that the witness be taken into immediate custody and delivered to an officer of this state to assure his attendance in this state. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

(2) If the witness is summoned to attend and testify in this state he shall be tendered the sum of ten cents a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending, and five dollars for each day that he is required to travel and attend as a witness. A witness who has appeared in accord-

ance with the provisions of the summons shall not be required to remain within this state a longer period of time than the period mentioned in the certificate, unless otherwise ordered by the court. If such witness, after coming into this state, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state.

942.04 *Exemption from arrest and service of process.*— (1) If a person comes into this state in obedience to a summons directing him to attend and testify in this state he shall not while in this state pursuant to such summons be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons.

(2) If a person passes through this state while going to another state in obedience to a summons to attend and testify in that state or while returning therefrom, he shall not while so passing through this state be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons.

942.05 *Uniformity of interpretation.*—This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of the states which enact it, and shall be only applicable to such state as shall enact reciprocal powers to this state relative to the matter of securing attendance of witnesses as herein provided.

942.06 *Short title.*—This chapter may be cited as "uniform law to secure the attendance of witnesses from within or without a state in criminal proceedings."

APPENDIX "E"

CERTIFICATE OF JUSTICES OF SUPREME COURT OF FLORIDA

IN THE SUPREME COURT OF FLORIDA

IN RE: THE APPLICATION OF THE PEOPLE OF THE STATE OF NEW YORK FOR AN ORDER REQUIRING ONE JOSEPH C. O'NEILL TO ATTEND AND TESTIFY BEFORE THE GRAND JURY OF THE COUNTY OF NEW YORK, STATE OF NEW YORK.

CASE NO. 28,978

CERTIFICATE

We, the undersigned Justices of the Supreme Court of Florida, being all of the Justices who participated in the decision of the above styled case, hereby certify as follows:

In the concluding paragraph of our opinion in this case, we held as follows:

> "After a careful study of both features of the law, we are convinced that it is unconstitutional • • •"

The law referred to in said quoted portion of our opinion was Section 942.02, Florida Statutes 1955.

The two features of said law referred to in said quoted matter were (1) the feature of said law which authorizes taking a witness into custody and delivering him to an officer of the requesting state; and (2) the feature of said law which authorizes the issuance of a summons requiring the attendance of a witness in the requesting state.

Our holding in said quoted part of our opinion that said law is unconstitutional as to both of said features had reference to the privileges and immunities clause of Section Two of Article Four of the United States Constitution and to the privileges and immunities clause of the Fourteenth Amendment to said Constitution, and our intention in making said holding was that, as to each of said features of said law, said law is unconstitutional because it conflicts with both of said privileges and immunities clauses of the United States Constitution.

This the 25th day of March, 1958.

GLENN TERRELL
Chief Justice

ELWYN THOMAS
Justice

T. FRANK HOBSON
Justice

CAMPBELL THORNAL
Justice

STEPHEN O'CONNELL
Justice

ATTEST:

GUYTE McCORD
Clerk Supreme Court
of Florida

(SEAL)

SUPREME COURT, U. S.
SEP 10 1958
JAMES R. BROWNING, Clerk

Supreme Court of the United States

October Term, 1958

No. 53

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,

v.

JOSEPH C. O'NEILL,
Respondent.

BRIEF FOR THE PETITIONER

RICHARD W. ERVIN
Attorney General of Florida
The Capitol
Tallahassee, Florida

REEVES BOWEN
Assistant Attorney General of Florida
The Capitol
Tallahassee, Florida

FRANK S. HOGAN
District Attorney, New York County
155 Leonard Street
New York 13, N. Y.

Counsel for Petitioner

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Argument

I. The provision of Section 942.02, Florida Statutes 1955, which authorizes a judge of a Florida court of record to order that a witness in Florida be taken into custody and delivered to an officer of a requesting state for the purpose of assuring such witness' attendance at a criminal proceeding or grand jury investigation in such requesting state, where the requesting state has enacted similar reciprocal legislation, is not unconstitutional because of conflict with the privileges and immunities clause of Article IV, Section 2, of the United States Constitution or with the privileges and immunities clause of the Fourteenth Amendment to said Constitution — 13

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C. The right of free ingress and egress is not absolute. It may be interfered with by a state in order to protect its citizens and provide for its internal security and the safety and good order of society, and in order to assist sister states to do the same things for themselves and their citizens as a matter of comity. The challenged Florida statutory provision is necessary for the accomplishment of these objectives 15

II. The provision of Section 942.02, Florida Statutes 1955, which authorizes a judge of a Florida court of record to issue a summons to a witness in Florida directing him to attend and testify in a criminal proceeding in a requesting state which has adopted similar reciprocal legislation, is not unconstitutional because of conflict with the privileges and immunities clause of Article IV, Section 2, of the United States Constitution or with the privileges and immunities clause of the Fourteenth Amendment to said Constitution 26

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Supreme Court of the United States

October Term, 1958

No. 53

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,

v.

JOSEPH C. O'NEILL,
Respondent.

BRIEF FOR THE PETITIONER

Opinions of the Courts Below

The opinion of the Circuit Court of Dade County, Florida (R. 20-32) was delivered on July 20, 1956 and is reported in 9 Fla. Supp. 153-164.

The opinion of the Supreme Court of Florida (R. 35-47) was delivered on January 22, 1958, and it is reported in 100 So. 2d 149-157.

Jurisdiction

The judgment of the Supreme Court of Florida which is before this Court for review is dated January 22, 1958, and it was entered on said date (R. 47).

A petition for rehearing was timely filed by the petitioner on February 4, 1958 (R. 48-51), and said judgment became final when said Court entered its order on February 24, 1958, denying said petition for rehearing (R. 51).

Said judgment struck down as unconstitutional Section 942.02, Florida Statutes 1955 (Appendix "A"), which is a part of the "uniform law to secure the attendance of witnesses from within or without a state in criminal proceedings." As appears from the opinion of said Court (R. 35-47) and the certificate of the Justices of said Court who participated in the decision of the case (R. 52), said Court held:

That said statute is unconstitutional because of conflict with the privileges and immunities clause of Section 2 of Article IV of the Constitution of the United States and with the privileges and immunities clause of the Fourteenth Amendment to said Constitution, (1) insofar as said statute authorizes a judge of a court of record in Florida to order that a witness in Florida be taken into custody and delivered to an officer of a requesting state which has also enacted a similar reciprocal law, and (2) insofar as said statute authorizes a judge of a court of record in Florida to issue a summons to a witness in Florida requiring his attendance in the court of a requesting state which has also enacted a similar reciprocal law.

The petitioner duly filed its petition for certiorari in this Court within ninety days after the entry of said judgment, as required by Section 2101(c), Title 28, U. S. Code. Said petition was filed on April 21, 1958, which was within ninety days after the date when the judgment of the Supreme Court of Florida became final by virtue of the denial of the petitioner's petition for rehearing and was also within ninety days after the said judgment was originally entered. This Court granted certiorari on June 2, 1958.

It is believed by the petitioner that Section 1257(3), Title 28, U. S. Code, confers on this Court jurisdiction to review the said judgment by writ of certiorari.

Constitutional Provisions and Statutes Involved

The constitutional provisions which this case involves are the privileges and immunities clause of Section 2 of Article IV of the Constitution of the United States, reading as follows:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

and the privileges and immunities clause of the Fourteenth Amendment to the Constitution of the United States, reading as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States * * *"

The statute which this case involves is Section 942.02, Florida Statutes 1955, which, along with Sections 942.01 and 942.03-942.06, Florida Statutes 1955, make up the

"Uniform law to secure the attendance of witnesses from within or without a state in criminal proceedings." Said statutes are found in Volume 2, Florida Statutes 1955, at pages 2927-2928. Since Section 942.02 is lengthy, it is not copied in this petition at this point but is set forth in the Appendix hereto. Also, in order that all of said uniform law may readily be examined by the Court, the other above mentioned Sections thereof are also copied into the Appendix (Appendix "A").

Questions Presented for Review

The questions presented for review are as follows:

Question One

Is Section 942.02, Florida Statutes 1955, being a part of the "uniform law to secure the attendance of witnesses from within or without a state in criminal proceedings," unconstitutional because of conflict with the privileges and immunities clause of Section 2 of Article IV of the Constitution of the United States or with the privileges and immunities clause of the Fourteenth Amendment to said Constitution, or with both of said privileges and immunities clauses, insofar as said statute authorizes a judge of a court of record in Florida to order that a witness in Florida be taken in custody and delivered to an officer of a requesting state for the purpose of procuring such witness' testimony in a criminal prosecution or grand jury investigation in a court of the requesting state, where such requesting state has also enacted a similar reciprocal law?

Question Two

Is Section 942.02, Florida Statutes 1955, being a part of the "uniform law to secure the attendance of witnesses from within or without a state in criminal proceedings," unconstitutional because of conflict with the privileges and immunities clause of Section 2 of Article IV of the Constitution of the United States or with the privileges and immunities clause of the Fourteenth Amendment to said Constitution, or with both of said privileges and immunities clauses, insofar as it authorizes the judge of a court of record in Florida to issue a summons to a witness in Florida directing him to attend and testify in a court of a requesting state in a criminal prosecution or grand jury investigation, where such requesting state has also enacted a similar reciprocal law?

Statement of the Case

In 1936 New York enacted the uniform law to secure the attendance of witnesses from within or without a state in criminal proceedings and the same may be found as Section 618-a of the New York Code of Criminal Procedure.

In 1941, Florida adopted said uniform law and it later became Sections 942.01-942.06, Florida Statutes 1955, which are copied into the Appendix hereto (Appendix "A").

On April 23, 1956, there was filed in the Circuit Court of Dade County, Florida, a certificate executed pursuant to the requirements of said uniform law by Honorable Mitchell D. Schweitzer, one of the judges of the Court

of General Sessions, County of New York, State of New York (R. 1-5), seeking to require the attendance of the respondent, Joseph C. O'Neill, as a witness before a New York grand jury, the said respondent being a resident of the State of Illinois but being present in the State of Florida. Appended to said certificate was the affidavit upon which it was based, said affidavit having been executed by New York Assistant District Attorney Francis X. Clark (R. 6-9).

Said certificate recommended that the respondent be taken into immedaite custody and delivered to an officer of the State of New York to assure his attendance in New York (R. 3).

An attachment for the respondent, requiring his production before the Circuit Court to show cause, was issued on April 23, 1956 (R. 9-10). He was ordered released on bond (R. 10-11) and he made the required bond (R. 11).

On May 28, 1956, the respondent filed his response and motion to quash the rule to show cause (R. 13-18), wherein he raised the federal questions here sought to be reviewed as follows (R. 13-14):

> "FIRST: *That Chapter 942 Florida Statutes 1955, and particularly Sections 942.01 to 942.06 Florida Statutes,* entitled the 'Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings' *and each and every section thereof, separately and severally,* and Section 618-a, of the Code of Criminal Procedure of the State of New York, and each and every section thereof, *are unconstitutional, and null and void, because*: (Emphasis supplied.)
>
> • • •

> "(5) That each of said Acts, and each and every section thereof, separately and severally, is in contravention of and violates Article Four, Section 2, and the Fourteenth Amendment to the Constitution of the United States in that same abridges the privileges and immunities of Citizens of the United States, and deprives respondent of his liberty without due process of law and denies respondent the equal protection of the laws."

On July 20, 1956, after a hearing before the Circuit Court upon the pleadings, the Court rendered its opinion and order (9 Fla. Supp. 153-164; R. 20-32) in which it passed upon the respondent's above-quoted contention by holding Section 942.02 to be violative of the Fourteenth Amendment to the United States Constitution in that it abridges the privileges and immunities of citizens of the several states by impairing their right of free ingress and egress from state to state, as appears from the following quotation from the Court's opinion and order (R. 26):

> "Passing for the moment, the fact that the Legislature of this State is powerless to confer upon this, or any other Court of the State of Florida, jurisdiction to issue process running beyond the limits of the State, Section 942.02 Fla. Statutes 1955 also violates the Fourteenth Amendment to the Constitution of the United States in that it abridges the privileges and immunities of citizens of the several states, since it impairs the right of free ingress and egress from state to state, which is one of the rights of national citizenship guaranteed by the Fourteenth Amendment to the Constitution of the United States. Edwards v. California, 314 US 160, 62 S. Ct. 164; In Re Allen, supra; Commonwealth v. Klaus, supra, and Commonwealth v. Pennsylvania, supra."

The Court sustained the respondent's motion to quash and discharge the rule to show cause in the following language (R. 30-31):

"Upon consideration of the application of the People of The State of New York, the Court is of the opinion that said Application should be denied, and this proceeding dismissed, and therefore, it is

"CONSIDERED, ORDERED, AND ADJUDGED, as follows:

"1. That the Motion of JOSEPH O'NEILL to quash and discharge the Rule to Show Cause issued in the above-styled cause, and directed to him, be and the same is hereby granted, and said Rule to Show Cause is hereby quashed and discharged, and said JOSEPH O'NEILL is hereby discharged from custody thereunder."

In its opinion and order, the Circuit Court also held Section 942.02, Florida Statutes 1955, to be unconstitutional upon the grounds that it attempted to give the courts of Florida jurisdiction to issue process having extra-territorial operation, and that it unconstitutionally permitted a witness to be taken into custody and delivered to an officer of the requesting state without allowing such witness to make bail. The Court further held that the certificate and affidavit did not state sufficient facts to show that the respondent was a material and necessary witness.

On August 15, 1956, the petitioner filed its notice of appeal from said order to the Supreme Court of Florida (R. 32) and thereafter duly perfected its appeal to the Supreme Court.

The petitioner duly raised the federal questions here sought to be reviewed in its assignments of error numbered 1, 2, 3 and 4, reading as follows (R. 33):

"1. That the Court erred in granting the Motion to Quash the Rule to Show Cause in these proceedings.

"2. That the Court erred in its ruling that Chapter 942.02, Florida Statutes 1955, is unconstitutional.

"3. That the Court erred in its ruling that subsection 1 of Chapter 942.02, Florida Statutes 1955, is unconstitutional, void, and of no effect insofar as the portion of this statute which confers jurisdiction upon any court of record in the State of Florida to make an order directing a witness to appear before a court in another State.

"4. That the Court erred in its ruling that subsection 1 of Chapter 942.02 Florida Statutes 1955 violates the 14th Amendment to the Constitution of the United States, in that it abridges the privileges and immunities of citizens of the several states."

On January 22, 1958, the Supreme Court of Florida handed down its opinion (100 So. 2d 149-157; R. 35-47) and its judgment (R. 47) affirming the order appealed from. The opinion answered the federal questions here involved by holding that Section 942.02 unconstitutionally conflicts with the privileges and immunities clauses of Section 2 of Article IV and the Fourteenth Amendment to the United States Constitution, (1) insofar as it permits a witness to be taken into custody and delivered to an officer of the requesting state, and (2) insofar as it authorizes the issuance of a summons requiring a witness to attend and testify in a criminal matter in the courts of another state. [*In this connection, see the certificate of the Justices of the Supreme Court of Florida who participated in the decision* (R. 52), *which certificate clearly shows that the holding of unconstitutionality has reference to the privileges and immunities clauses of Section 2 of Article IV and the Fourteenth Amendment to the United States Constitution.*]

The opinion did not pass upon the question of whether the statute is unconstitutional as attempting to confer upon the Courts of Florida jurisdiction to issue process operating extra-territorially.

The Court specifically declined to pass upon the question of whether the statute is unconstitutional because it does not provide for bail for persons attached and delivered into custody of an officer of another state.

Finally, the opinion specifically rejected the Circuit Court's holding that the certificate of the judge of the requesting state did not state sufficient facts to show that the respondent was a material and necessary witness.

Summary of Argument

The privilege or immunity involved is the right of free inter-state ingress and egress. This right is not unconstitutionally infringed either by the provision of the Florida statute authorizing the bodily delivery of a witness to a requesting state having a similar reciprocal law or by the provision authorizing the issuance of a summons requiring his attendance in a requesting state.

These provisions are necessary for two purposes, viz:

1. In order that Florida may protect its citizens and provide for its internal security and the safety and good order of society.

2. In order that, through the exercise of comity, Florida may assist other states having similar statutory provisions to do the same things for themselves and their citizens.

It is just as important for a state to have necessary witnesses at grand jury investigations and criminal trials as it is to have custody of defendants charged with crimes. It is of no help to a state to acquire custody of a defendant by arresting him within its own bounds or by extraditing him from another state unless it can procure the necessary witnesses to testify against him.

Not only does the public interest require that a state have some means whereby necessary witnesses in other states may be summoned to appear in criminal proceedings in its courts but it also requires that a state have a way to assure the attendance of a necessary out-of-state witness by having him taken into custody and brought before its court. In many instances, witnesses are reluctant and would disobey subpoenas directing them to attend court in another state, preferring to either face contempt proceedings for their disobedience or to leave the state and avoid punishment as well as giving the testimony sought of them. This is especially true when the witnesses are associated with organized crime, which will go to any lengths to defeat the investigation and prosecution of crimes committeed by its agents.

In virtually all the states, the confrontation rule, often implemented by a constitutional provision, makes it impossible to try a defendant without producing in open court the witnesses against him. In many states, depositions cannot even be used in grand jury investigations. These factors emphasize the need for procuring the personal presence of witnesses. The Congress has enacted no legislation to enable the states to procure necessary witnesses from each other and the only way it can be done is by means of the uniform law here under review, which has been adopted by forty-two states and Puerto Rico.

Florida protects its own internal security when it furnishes witnesses to other states under the uniform law, since it thereby places itself in position to obtain the reciprocal benefits of the law by procuring necessary witnesses from other states. Other states will not aid Florida unless Florida aids them.

The right of free ingress and egress is not absolute. It may be interfered with by a state for the purpose of preserving its internal security and protecting its citizens and the safety and good order of society, and for the purpose of extending comity to its sister states in order to help them to do the same things for themselves and their citizens.

For these purposes a state has the reserved sovereign power to interfere with the right of free ingress and egress. This right is lawfully interfered with every day in a multitude of ways, without violating the constitutional provisions securing the right.

A state has the power to enact legislation authorizing the surrender to another state of a person charged with crime in the latter state even though such person is not a fugitive subject to extradition under the federal extradition statute. By the same token, a state has the power to enact legislation authorizing the bodily surrender of a necessary witness to another state and authorizing the summoning of such a witness to attend court in another state, since procuring necessary witnesses is as vital to criminal investigations and prosecutions as is procuring custody of the defendants for trial.

The uniform law under review is a valid exercise of Florida's reserved sovereign power to defend itself against crime and to exercise comity towards other states by assisting them to defend themselves against crime.

ARGUMENT

I

The provision of Section 942.02, Florida Statutes 1955, which authorizes a judge of a Florida court of record to order that a witness in Florida be taken into custody and delivered to an officer of a requesting state for the purpose of assuring such witness' attendance at a criminal proceeding or grand jury investigation in such requesting state, where the requesting state has enacted similar reciprocal legislation, is not unconstitutional because of conflict with the privileges and immunities clause of Article IV, Section 2, of the United States Constitution or with the privileges and immunities clause of the Fourteenth Amendment to said Constitution.

A. The Florida Statutory Provisions Involved

The statutory provision here involved is Subsection 3 of Section 942.02, Florida Statutes 1955 (Appendix "A"), which provides that if the certificate (meaning the certificate of the judge of the requesting state) recommends that the witness be taken into custody and delivered to an officer of the requesting state to assure his attendance in the requesting state, and the judge (meaning the Florida judge) at the hearing, being satisfied of the desirability of such custody and delivery, may, in lieu of issuing subpoena or summons, order that the witness be forthwith taken in custody and delivered to an officer of the requesting state.

This provision is to be considered in the light of the fact that Subsection 1 of Section 942.02 (Appendix "A") requires that the certificate be made by a judge of a court

of record in a state which by its laws has made provision for commanding persons within that state to attend and testify in Florida, and in the light of Section 942.05, Florida Statutes 1955 (Appendix "A"), which provides that the entire chapter which includes Section 942.02 shall be applicable only to states which shall enact reciprocal powers to Florida relative to the securing attendance of witnesses.

B. The Privilege or Immunity Involved: The Right of Free Ingress and Egress

The Supreme Court of Florida held that the provisions of Subsection 3 of said Section 942.02 violate the privileges and immunities clauses of Article IV, Section 2, and the Fourteenth Amendment by depriving a person of the right of free ingress and egress, the right to pass freely from state to state (R. 41-46, 52). Thus, the only constitutional privilege or immunity which is here involved is the right of free ingress and egress.

This Court has held that the privileges and immunities clause of Article IV, Section 2, of the United States Constitution guarantees to the citizens of each state the right of free ingress into other states, and free egress from them. *Paul* v. *Virginia*, 8 Wall. 168. However, the Court has also said that the *sole purpose* of the privileges and immunities clause of Article IV, Section 2, was to declare to the several states that whatever the rights called privileges and immunities of citizens of the states, "as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction." *Slaughter-House Cases*, 16 Wall. 36, 75-77. In other words, the privileges

and immunities clause was *intended to prevent discrimination* by the several states against citizens of other states in respect to the fundamental privileges of citizenship. *Maxwell v. Bugbee,* 250 U. S. 525, 537.

Section 942.02, Florida Statutes 1955, does not discriminate between citizens of Florida and those of other states found within its borders, but applies to all alike.

This Court has said that among the rights and privileges of national citizenship (the type of citizenship dealt with in the Fourteenth Amendment) is the right to pass freely from state to state. *Twining* v. *New Jersey,* 211 U. S. 78, 97.

C. The right of free ingress and egress is not absolute. It may be interfered with by a state in order to protect its citizens and provide for its internal security and the safety and good order of society, and in order to assist sister states to do the same things for themselves and their citizens as a matter of comity. The challenged Floirda statutory provision is necessary for the accomplishment of these objectives.

1. Said statutory provision is necessary for the purpose of protecting Florida's citizens and providing for its internal security and the safety and good order of society, and for the purpose of assisting sister states to do the same things for themselves and their citizens.

It is apparent that the purpose of the Florida provision is to authorize the delivery of a witness to an officer of a requesting state which has a similar reciprocal law where the circumstances are such as to require delivery

in order to assure the presence of the witness in the requesting state. At times there is no other way to cause a witness to appear and testify in the requesting state except to take him into custody and bodily transport him to that state. It is well known that some witnesses would not hesitate to disobey a summons in order to avoid giving testimony in another state. A nonresident of Florida, and the respondent is a nonresident, could, if merely summoned, depart for his home state (in this case Illinois, which does not have a similar reciprocal provision) and leave the Florida court impotent to require his attendance in a requesting state which has adopted a similar reciprocal law, and also leave the Florida court unable to punish him for failing to obey the summons. Moreover, a witness residing in Florida could flout a summons requiring his attendance in a requesting state and avoid appearing there by either absconding from Florida or remaining within its bounds and suffering contempt penalties imposed by the court issuing the summons.

It is of no help to a state to acquire custody of a defendant by arresting him within its own borders or by extraditing him from another state and at the same time say to that state that it is completely powerless to procure vitally necessary witnesses against him from another state even though the latter is willing, as a matter of comity, to use the processes of its courts to require such witnesses to attend court in the requesting state where the criminal proceeding is pending. Obtaining custody of a defendant is an empty victory if the state cannot obtain the witnesses with which to prosecute him.

If it should be held that the states have no right to exchange witnesses in criminal proceedings under the pro-

vision of the uniform law here under consideration, organized crime would not hesitate to avail itself of the hiatus in the law by sending essential witnesses across state lines in full awareness that no conviction could ever be obtained without procuring the personal presence of such witnesses in the state wherein the criminal proceedings are pending. The only way to assure the presence of a witness who has been sent across state lines by organized crime for the purpose of preventing him from testifying is to take him into custody and deliver him to an officer of the state from which he fled; if such a witness were merely summoned, he could, and probably would, disregard the summons and flee to still another state.

In most states a person accused of crime has the right to confront the witnesses against him face to face. It is a common law right. *23 C. J. S. 360, Criminal Law, Section 999.* It is secured by the Constitutions of all except a small number of the states, while in some of the other jurisdictions the right is purely statutory. *14 Am. Jur. 890-891, Criminal Law, Section 178.* It is therefore not legally possible in most states for the prosecution to use the deposition of an absent witness against the accused at his trial. Further, the law of many states does not permit the prosecution to use depositions in preliminary proceedings such as grand jury investigations. Even if all the states permitted the use of depositions in grand jury investigations of crime, that would do no more than enable the procurement of indictments; it would be of no avail in trials of the defendants for the offenses charged. In view of the practically universal confrontation rule, the states must have available some such method of exercising comity between themselves as is provided by the said uniform law if they are to be able to preserve their internal security against criminals.

Florida protects its own internal security and protects its own citizens against crime when it takes a witness into custody and delivers him to an officer of a requesting state which has a similar reciprocal law. By doing so, it places itself in position to obtain the reciprocal benefits of the law by securing from other states witnesses essential to the investigation and prosecution of crime in Florida. Other states will not aid Florida to obtain witnesses unless Florida aids them.

Moreover the provision is necessary in order that Florida may assist its sister states which have adopted similar statutes. Comity, concord and harmony between the states requires Florida to render to other states the assistance authorized by its provision when they are willing and ready to render like assistance to Florida.

2. The right of free ingress and egress is not absolute. It may be interfered with by a state in order to protect its citizens and provide for its internal security and the safety and good order of society, and in order to assist sister states to do the same for themselves and their citizens as a matter of comity.

As this Court said in *Toomer* v. *Witsell*, 334 U. S. 385, 396, in considering the privileges and immunities clause of Article IV, Section 2,

> "Like many other constitutional provisions, the privileges and immunities clause is not an absolute."

In *Coppage* v. *Kansas*, 236 U. S. 1, 18-19, after citing its previous decisions, this Court said:

> "An evident and controlling distinction is this: that in those cases it has been held permissible for the

states to adopt regulations fairly deemed necessary to secure some object directly affecting the public welfare, even though the enjoyment of private rights of liberty and property be thereby incidentally hampered; * * *"

* * *

"But, in our opinion, the Fourteenth Amendment debars the states from striking down personal liberty or property rights or materially restricting their normal exercise, *excepting so far as may be incidentally necessary for the accomplishment of some other and paramount object, and one that concerns the public welfare.*" (Emphasis supplied.)

The police power, which is a reserved sovereign power of the state, entitles it to interfere with a citizen's right of free ingress and egress when it becomes necessary in order to promote the internal security, good order and the welfare of the state.

As this Court said in *Panhandle Eastern Pipe Line Company* v. *State Highway Commission of Kansas*, 294 U. S. 613, 622, the police power of a state springs from its obligation to protect its citizens and provide for the safety and good order of society; it is the governmental power of self-protection and it permits reasonable regulation of rights in particulars essential to the preservation of the community from injury.

The police power was reserved to the states at the time the original Constitution was adopted and the Fourteenth Amendment was not designed to interfere with the power of the state to protect the lives, liberty and property of its citizens and to promote their health, morals, education and good order. *Giozza* v. *Tiernan*, 148 U. S. 657, 662.

The police power is one of the least limitable of governmental powers. *Queenside Hills Realty Co., Inc.* v. *Saxl*, 328 U. S. 80, 83.

Freedom of ingress and egress is lawfully restricted every day in the interest of society. By charging a man with a crime and placing him in jail the state restricts his free ingress and egress. By convicting him and placing him in prison the state restricts his free ingress and egress. By subpoenaing a man to court for the purpose of testifying in a criminal case a state restricts his free ingress and egress for the time required to attend court. By placing a witness in jail in order to insure his attendance at the trial of a criminal case, the state restricts his free ingress and egress. By placing a man in quarantine because of a contagious, communicable disease, a state restricts his free ingress and egress. In these and many other instances, a man's freedom of ingress and egress is constitutionally restricted by the states in the exercise of their reserved sovereign powers notwithstanding the constitutional guaranties for the protection of the privileges and immunities of citizens of the several states and of the United States.

Florida's primary purpose in enacting the uniform law here under consideration was not to assist other states by furnishing them witnesses. Rather, it was to enable Florida to procure witnesses from other states in the interest of its own public necessity and self-preservation. In order to procure witnesses from other states it was necessary that Florida reciprocate by making witnesses available to other states. Since Florida must have witnesses from other states in order to prosecute criminal conduct and protect its internal safety, it was just as much an exercise of its reserved sovereign police power to en-

act the provision in issue as it would have been for it to enact a statute providing for taking a witness into custody within the State of Florida when necessary to insure that witness' attendance before a Florida grand jury or at the trial of a criminal case.

Moreover the statute was enacted by Florida as an act of comity to its sister states, to assist them in obtaining witnesses to enforce their own criminal laws. It would be valid on that basis even if Florida had not primarily served her own interests by enacting it.

That the several states have the sovereign power to provide for the internal safety of each of them, and to promote concord and harmony among all of them by mutually supporting each other in bringing offenders to justice, was dealt with by this Court in *Kentucky* v. *Dennison*, 24 How. 66, 101-102, in words as follows:

> *"Indeed, the necessity of this policy of mutual support, in bringing offenders to justice, without any exception as to the character and nature of the crime, seems to have been first recognized and acted on by the American Colonies;*
>
> • • •
>
> *"And when these Colonies were about to form a still closer union by the present Constitution, but yet preserving their sovereignty, they had learned from experience the necessity of this provision for the internal safety of each of them, and to promote concord and harmony among all their members; and it is introduced in the Constitution substantially in the same words,* but substituting the word 'crime' for the words 'high misdemeanor,' and thereby showing the deliberate purpose to include every offense known to the law of the State from which the party charged had fled.

"The argument on behalf of the Governor of Ohio, which insists upon excluding from this clause new offenses created by a statute of the State, and growing out of its local institutions, and which are not admitted to be offenses in the State where the fugitive is found, nor so regarded by the general usage or civilized nations, would render the clause useless for any practical purpose. For where can the line of division be drawn with anything like certainty? Who is to mark it? The Governor of the demanding State would probably draw one line, and the Governor of the other State another. And if they differed, who is to decide between them? Under such a vague and indefinite construction, the article would not be a bond of peace and union, but a constant source of controversy and irritating discussion. *It would have been far better to omit it altogether, and to have left it to the comity of the States, and their own sense of their respective interests, than to have inserted it as conferring a right, and yet defining that right so loosely as to make it a never failing subject of dispute and ill will.*" (Emphasis supplied.)

While it is true that the above-quoted statements dealt with persons charged with crime, it necessarily follows that, since there is no federal constitutional or statutory provision to enable states to obtain witnesses from each other, the states have the reserved sovereign power to provide for their internal safety and to promote concord and harmony among themselves by mutually supporting each other in procuring the attendance of witnesses from each other in criminal matters just as much as they would have had the unrestricted sovereign power to enact legislation on all aspects of interstate extradition except for the extradition clause in Article IV, Section 2, of the United States Constitution.

It is to be noted from the foregoing quotation from *Kentucky* v. *Dennison* that, even in the absence of an

enabling provision of the United States Constitution, the states would have had the power to extradite persons charged with crime from one state to the other, in the exercise of comity. Here, there is no federal constitutional provision or statute on the subject of the states obtaining witnesses from other states and the states have the power to enact appropriate legislation as an act of comity to their sister states.

This Court has expressly recognized that a fugitive from justice may be extradited solely under the authority of a state statute even when the governing federal statute does not authorize the extradition. *Ex parte Innes* (Texas), 173 S. W. 291, involved a woman fugitive from Georgia who had fled to Oregon, whence she was extradited to Texas. She was not subject to extradition from Texas to Georgia under the authority of the federal extradition statute because she had not fled to Texas. The Texas court held that she could be extradited to Georgia under authority of an enabling Texas statute. This Court affirmed in *Innes* v. *Tobin*, 240 U. S. 127, and upheld the power of a state to provide by statute for the surrender of fugitives not covered by the federal extradition statute. The reasoning was (pages 134-135) that by the omission of Congress to extend the federal statute to the full limits of constitutional power "it must have been intended to leave the subjects unprovided for not beyond the pale of all law, but subject to the power which then controlled them—state authority until it was deemed essential by further legislation to govern them exclusively by national authority."

Since the power of the state to prosecute criminals and to preserve its internal security against them is in many instances utterly dependent upon procuring necessary wit-

nesses from other states, and since the Congress has not legislated on the subject, we submit that the several states have just as much sovereign power to enact reciprocal legislation under which witnesses in criminal proceedings may be procured from each other as Texas had to enact legislation providing for the surrender of persons charged with crime who could not be extradited under federal law. The privileges and immunities clauses of the Federal Constitution are no more violated by the Florida statutory provision here under consideration than they were violated by the Texas statute considered in the *Innes* cases, *supra.*

The provision of Article IV, Section 2, United States Constitution, which deals with the extradition of fugitives does not authorize Congress to enact, and Congress has not enacted, a statute authorizing the extradition of a person charged with crime who is not a fugitive because he was not present in the charging state when he committed the act resulting in a crime in that state. Nevertheless, forty states (listed in *Uniform Laws Annotated,* 1957 Edition, Vol. 9, page 258) and Hawaii have enacted the Uniform Criminal Extradition Act, Section 6 of which provides for the extradition of persons not present in the demanding state at the time of the commission of the crime charged against them in that state (same volume, p. 297). That provision has been upheld as within the power of the states to enact. *Ennist* v. *Baden* (Fla.), 28 So. 2d 160; *Culbertson* v. *Sweeney* (Ohio), 44 N. E. 2d 807, 45 N. E. 2d 118; *English* v. *Matowitz* (Ohio), 72 N. E. 2d 898; *Lindley* v. *Crider* (Ark.), 265 S. W. 2d 498; *Ex parte Morgan,* (Cal.), 194 P. 2d 800; *People ex rel. Faulds* v. *Herberich* (N. Y.), 93 N. Y. S. 2d 272, affirmed 93 N. E. 2d 913; *State* v. *Kriss* (Md.), 62 A. 2d 568; *Cassis* v. *Fair* (W. Va.), 29 S. E. 2d 245; *Ex parte Dalton* (N. M.), 244 P. 2d 790; *Ex parte Bledsoe* (Okla.), 227 P. 2d 680.

Such a provision may be enacted by virtue of a state's reserved sovereign power and as an act of comity to a sister state, as appears from the following quotation from *22 Am. Jur. 250*, Extradition, Section 9:

> "A state may also, in the exercise of its reserved sovereign powers and as an act of comity to a sister state, provide by statute for the surrender, on requisition, of persons who are indictable for a crime committed through their constructive presence in such sister state, even though they have never been corporally within such state and have never fled therefrom to escape arrest and punishment, since, in the absence of such statute, such persons are not subject to extradition by the latter state."

Along the same lines is Section 5 of the Uniform Reciprocal Enforcement of Support Act (*Uniform Laws Annotated*, 1957 Edition, Volume 9C, page 23), which provides for the surrender in extradition proceedings of a person charged with the crime of failing to provide for the support of his dependents and which specifies that such surrender shall be made although the person whose surrender is demanded was not in the demanding state at the time of the commission of the crime and although he had not fled therefrom. This act has been adopted by almost all the states (*Uniform Laws Annotated*, 1957 Edition, Volume 9C, pages 1 and 2). Despite the fact that said Section 5 authorizes the surrender of a nonfugitive, it has been upheld as an exercise of the state's reserved sovereign powers and as an act of comity to a sister state. *State* v. *Bennett* (Fla.), 90 So. 2d 43; *Harrison* v. *State* (Ala.), 77 So. 2d 384, 77 So. 2d 387; *Ex parte Coleman* (Tex.), 245 S. W. 2d 712.

It is clear that in the exercise of its reserved sovereign power, and as an act of comity to a sister state, a state

may aid a sister state by bodily surrendering a person charged with crime even though no federal law authorizes the surrender and even though the surrender is of no immediate benefit to the surrendering state or its inhabitants. Therefore, we submit that a state also has the reserved sovereign power to exercise comity to other states by bodily surrendering to them necessary witnesses, without which crime may not be investigated or prosecuted; and that this is so even though the surrendering state obtains no immediate benefit from the surrender; the benefit to it accrues from the reciprocal operation of the statutes of the states involved.

II

The provision of Section 942.02, Florida Statutes 1955, which authorizes a judge of a Florida court of record to issue a summons to a witness in Florida directing him to attend and testify in a criminal proceeding in a requesting state which has adopted similar reciprocal legislation, is not unconstitutional because of conflict with the privileges and immunities clause of Article IV, Section 2, of the United States Constitution or with the privileges and immunities clause of the Fourteenth Amendment to said Constitution.

Subsections 1 and 2 of Section 942.02, Florida Statutes 1955, are the statutory provisions with which this point is concerned. They authorize the judge of a court of record in Florida to issue a summons to a witness in Florida directing him to attend and testify in a court of a requesting state in a criminal prosecution or grand jury investigation (Appendix "A").

Subsection 1 requires that the certificate be executed by a judge of a court of record of a state which by its laws has made provision for commanding persons within that state to attend and testify in Florida; also, Section 942.05 makes the entire uniform law reciprocal in operation (Appendix "A").

We think that the arguments found in the foregoing part of this brief are equally applicable to the point here involved and we here rely upon them to sustain our contention that Florida has the right and power to enact a reciprocal law authorizing the issuance of a summons to a witness in Florida, directing him to attend and testify in a court of a requesting state in a criminal prosecution or grand jury investigation, where such requesting state has also enacted a similar reciprocal law.

Conclusion

The petitioner believes itself entitled to the following relief:

1. That this Court will hold that Section 942.02, Florida Statutes 1955, is not unconstitutional because of conflict with the privileges and immunities clause of Article IV, Section 2, of the Constitution of the United States or with the privileges and immunities clause of the Fourteenth Amendment to said Constitution, insofar as said statute authorizes the judge of a court of record in Florida to order that a witness in Florida be taken into custody and delivered to an officer of a requesting state for the purpose of assuring such witness' attendance at a criminal prosecution or grand jury investigation in a court of such requesting state, when such requesting state has also enacted a similar reciprocal law.

2. That this Court will hold that Section 942.02, Florida Statutes 1955, is not unconstitutional because of conflict with the privileges and immunities clause of Article IV, Section 2, of the Constitution of the United States or with the privileges and immunities clause of the Fourteenth Amendment to said Constitution, insofar as it authorizes the judge of a court of record in Florida to issue a summons to a witness in Florida, directing him to attend and testify in a court of a requesting state in a criminal prosecution or grand jury investigation, when such requesting state has also enacted a similar reciprocal law.

3. That this Court will reverse the judgment of the Supreme Court of Florida which is here under review and remand the cause to said Court for further proceedings.

Respectfully submitted,

RICHARD W. ERVIN
Attorney General of Florida
The Capitol
Tallahassee, Florida

REEVES BOWEN
Assistant Attorney General of Florida
The Capitol
Tallahassee, Florida

FRANK S. HOGAN
District Attorney, New York County
155 Leonard Street
New York 13, N. Y.

Counsel for Petitioner

APPENDIX "A"

Sections 942.01 Through 942.06, Florida Statutes 1955

942.01 *Definitions.*—"Witness"—as used in this chapter shall include a person whose testimony is desired in any proceeding or investigation by a grand jury or in a criminal action, prosecution or proceeding held by the prosecution or the defense.

The word "state" shall include any territory of the United States and District of Columbia.

The word "summons" shall include a subpoena, order or other notice requiring the appearance of a witness.

942.02 *Summoning witness in this state to testify in another state.*—

(1) If a judge of a court of record in any state which by its laws has made provision for commanding persons within that state to attend and testify in this state certifies under the seal of such court that there is a criminal prosecution pending in such court, or that a grand jury investigation has commenced or is about to commence, that a person being within this state is a material witness in such prosecution, or grand jury investigation, and that his presence will be required for a specified number of days, upon presentation of such certificate to any judge of a court of record in the county in which such person is, such judge shall fix a time and place for a hearing, and shall make an order directing the witness to appear at a time and place certain for the hearing. The witness shall at all times be entitled to counsel.

(2) If at a hearing the judge determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in the prosecution or a grand jury investigation in the other state, and that the laws of the state in which the prosecution is pending, or grand jury investigation has commenced or is about to commence (and of any other state through which the witness may be required to pass by ordinary course of travel), will give to him protection from arrest and the service of civil and criminal process, he shall issue a summons, with a copy of the certificate attached, directing the witness to attend and testify in the court where the prosecution is pending, or where a grand jury investigation has commenced or is about to commence at a time and place specified in the summons. In any such hearing the certificate shall be prima facie evidence of all the facts stated therein.

(3) If said certificate recommends that the witness be taken into immediate custody and delivered to an officer of the requesting state to assure his attendance in the requesting state, such judge may, in lieu of notification of the hearing, direct that such witness be forthwith brought before him for said hearing; and the judge at the hearing being satisfied of the desirability of such custody and delivery, for which determination the certificate shall be prima facie proof of such desirability may, in lieu of issuing subpoena or summons, order that said witness be forthwith taken in custody and delivered to an officer of the requesting state.

(4) If the witness, who is summoned as above provided, after being paid or tendered by some properly authorized person the sum of ten cents a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending and five dollars for each day,

that he is required to travel and attend as a witness, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state.

942.03 *Witness from another state summoned to testify in this state.*—

(1) If a person in any state, which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions, or grand jury investigations commenced or about to commence, in this state, is a material witness in a prosecution pending in a court of record in this state, or in a grand jury investigation which has commenced or is about to commence, a judge of such court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. Said certificate may include a recommendation that the witness be taken into immediate custody and delivered to an officer of this state to assure his attendance in this state. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

(2) If the witness is summoned to attend and testify in this state he shall be tendered the sum of ten cents a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending, and five dollars for each day that he is required to travel and attend as a witness. A witness who has appeared in accordance with the provisions of the summons shall not be required to remain within this state a longer period of time than the period mentioned in the certificate, unless otherwise ordered by the court. If such witness, after coming

into this state, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state.

942.04 *Exemption from arrest and service of process.*—

(1) If a person comes into this state in obedience to a summons directing him to attend and testify in this state he shall not while in this state pursuant to such summons be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons.

(2) If a person passes through this state while going to another state in obedience to a summons to attend and testify in that state or while returning therefrom, he shall not while so passing through this state be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons.

942.05 *Uniformity of interpretation.* — This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of the states which enact it, and shall be only applicable to such state as shall enact reciprocal powers to this state relative to the matter of securing attendance of witnesses as herein provided.

942.06 *Short title.*—This chapter may be cited as "uniform law to secure the attendance of witnesses from within or without a state in criminal proceedings."

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SUPREME COURT OF THE UNITED STATES

October Term, 1958

No. 53

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner

vs.

JOSEPH C. O'NEILL,

Respondent

CERTIORARI TO SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF

L. J. CUSHMAN
Attorney for Respondent
706 Ainsley Building
Miami 32, Florida
Phone FRanklin 3-6383

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SUPREME COURT OF THE UNITED STATES

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THE PEOPLE OF THE STATE OF NEW YORK,

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JOSEPH C. O'NEILL,

Respondent

CERTIORARI TO SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF

The essential, material facts of the case at bar are these:

Joseph C. O'Neill, the general president of the Distillery, Rectifying, Wine and Allied Workers' International Union of America [A.F. of L.] (R: 7) was a citizen, and

resident of the state of Illinois, having his home and domicile in Elmwood Park, a suburb of Chicago, Cook County, Illinois, and never was a citizen of Florida nor a resident or citizen of New York. (R: 15) On or about April 23, 1956, Mr. O'Neill came to Florida for a temporary sojourn of a few days to attend a convention of the union of which he was president, which was in session in the City of Miami Beach, Florida, intending to remain in Florida only during the time said convention was in session, whereupon he intended to return to his home in Illinois. (R: 15-16) Mr. O'Neill had never been charged by indictment, or indeed, by any form of accusation, with violation of any of the Penal Laws of New York, or Florida, and on the day he came to Florida was not charged with violating any of the criminal or penal laws of New York, Florida or any other state. (R: 16-17) The State of New York had adopted the so-called "Uniform Law To Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings," as Section 618-a of the New York Code of Criminal Procedure, and Florida had substantially adopted said Act as Ch. 942 Fla. Statutes 1955. When Mr. O'Neill arrived in Florida he was arrested and seized under an attachment (R: 9-10) issued by a Circuit Judge of Dade County, Florida, and ordered (R: 10-11) to show cause why he should not be returned to New York in the custody of officers of the State of New York, as a witness before a Grand Jury of New York County, New York. Upon Mr. O'Neill's response, and motion to quash (R: 13-18) the Circuit Judge entered an opinion and order (R: 20-32) in which he held said act unconstitutional, and discharged Mr. O'Neill from the rule to show cause. In re O'Neill, 9 Fla. Supp. 153. (Appendix A) The People

of the State of New York appealed (R: 32) and the Supreme Court of Florida affirmed [See: Application of the People of New York, etc. 100 So. 2d. 149, Appendix B] the lower court (R: 35-47) and this court granted certiorari.

This is the first case to reach this court which presents for consideration the constitutionality of the so-called "Uniform Law To Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings," and we respectfully contend that the lower courts correctly held said act to be unconstitutional.

The History of the Act

The so-called "Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings" (Ch. 942 Fla. Statutes 1955) was first adopted by the National Conference of Commissioners on Uniform State Laws and proposed for adoption by the several states in 1931, and has since been adopted with variations in its text by 42 States and the Territory of Puerto Rico. (See: 9 ULA Supp. 33).

During more than a quarter of a century since this Act was first proposed for adoption, and in spite of the fact that it has been adopted, at least in its broad outlines, by 42 States and the Territory of Puerto Rico, there had been only eleven (11) reported decisions construing or passing upon its various provisions until the case at bar arose, in April 1956, and its constitutionality had never been squarely considered or passed upon by any state court of last resort until the decision by the Supreme

Court of Florida in the case at bar, **APPLICATION OF PEOPLE OF STATE OF NEW YORK** (Fla.) 100 So 2d 149. Those eleven (11) decisions are listed in the Appendix to the nisi prius Court's opinion (See: 9 Fla. Supp. 164; R: 31-32) and since that time there have been no later decisions.

The Particular Provision of the Act Under Consideration Has Been Held Unconstitutional Twice—Never Held Constitutional.

Out of the eleven (11) cases, only three (3) involved the Constitutionality of the Act. **In re Allen** (1940) 49 Pa. D. & C. 631, **held the particular provisions of the Act here under consideration** (Sub. Sec. 3 of Sec. 942.02) **to be unconstitutional.** In **Re Cooper,** 127 N.J.L. 312, 22 A. 2d, 532, decided in 1941, held the Section authorizing issuance of a subpoena to the witness constitutional **as against the attack there made, but the particular provision of the Act here under consideration** (Sub. Sec. 3 of Sec. 942.02) **was not involved, and its constitutionality was not considered nor passed upon at all. In Re Saperstein,** 30 N. J. Super. 373, 104 A. 2d. 842, decided in 1954, the third case, **likewise did not involve the particular provision of the Act here under consideration (Sub. Sec. 3 of Sec. 942.02) and again the constitutionality of that particular provision of the Act was not before the Court, and was neither considered nor passed upon.** Thus, in the three (3) reported cases in which the constitutionality of the Act have been considered, **only one** (In re Allen, 49 Pa. D. & C. 631) **involved the constitutionality of Sub-Section 3 of Sec. 942.02,**

and that Court held it unconstitutional and void. The only other reported case in which the constitutionality of Sub. Sec. 3 of Sec. 942.02 has been considered and passed upon is that of the nisi prius court **(In re O'Neill, 9 Fla., Supp. 153)** from which the appeal was taken to the Supreme Court of Florida and the Supreme Court of Florida likewise held the particular provision here under consideration unconstitutional and void, **Application of People of State of New York, (Fla) 100 So 2d. 149,** and we contend, properly so.

In the case at bar, the Petitioner did not seek the mere issuance of a summons or witness subpoena directed to O'Neill, as authorized by Sub. Sec. 2 of Sec. 942.02, but instead, sought (R: 3) an order that he be "taken into immediate custody in Florida and delivered to an officer of the State of New York to assure his attendance" in New York, pursuant to Sub. Sec. 3 of Sec. 942.02, so that the case at bar turns upon the constitutionality of that particular provision of the Act. The question thus presented has never been considered or passed upon by the court of last resort of **any State** or by any Federal District or Appellate Court, or the Supreme Court of the United States, and except for **In re Allen, supra,** and the decision in this case **(In re O'Neill,** 9 Fla. Supp. 133, and **Application of People of State of New York,** supra), has never been passed upon at all. Even **Commonwealth v. Klaus, 130 NYS 713,** upon which Petitioner's counsel relied below, did not pass upon the particular provision (Sub. Sec. 3 of Sec. 942.02) here involved because, **first,** that case was decided in 1911, **twenty** years before the so-called "Uniform Act" was adopted by the National Conference of Commissioners on Uniform Laws, and, **second,** the New York Act there under consideration did not contain any

provision such as or even similar to sub—sec. 3 of Sec. 942.02, which provides that the witness "be taken into immediate custody and delivered to an officer of the requesting State", but even so, there was a strong dissenting opinion in **Commonwealth v. Klaus**, supra, which casts grave doubt as to the authority of that decision.

In short: The question presented in this case is one of first impression in this Court, and the only reported decisions (**In re Allen**, supra, and **In re O'Neill, 9 Fla. Supp. 153**, and **Application of People of State of New York**, 100 So 2d. 149) have held the particular provision (Sub. Sec. 3 of Sec. 942.02) here in question to be unconstitutional, and void—no Court has ever held it constitutional.

The Challenged Act Was Invalid as an Unconstitutional Restriction Upon the Right of Free Ingress and Egress from State to State.

Counsel for Petitioner apparently recognizes and concedes that the right of every American citizen to pass freely from State to State is an incident of NATIONAL citizenship, but argues that so long as all citizens are treated alike, the constitutional requirements are satisfied. In this contention we are confident that counsel errs: the "privileges and immunities of citizens of the several states" conferred, guaranteed, and protected against State action by Sec. 2, Article 4, and the 14th Amendment to the Federal Constitution are not limited to "equal protection of the laws". True, the 14th Amendment forbids any State to "deny to any person within its jurisdiction the equal protection of the laws", but that prohibition is in addition to the guarantee that "no State

shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States" or "the several states". If a State does attempt to "make or enforce any law which shall abridge the privileges and immunities of citizens of the United States" or "the several states", such law would be unconstitutional and void, we submit, even though it applied alike to every citizen.

We do not contend that the right of free ingress and egress was ever intended to interfere with the orderly administration of justice within the territorial boundaries of the State, but we do contend that it does forbid Florida or any other State to deport a citizen to another State against his will without due process of law; it forbids kidnapping a citizen not charged with having committed a crime against the laws of Florida or any other State, and shipping him to another State as a prisoner, even if that kidnapping is attempted under the form or guise of law. The right of American citizens to pass freely from State to State is not an imaginary, or theoretical right, but a real, substantial and valuable privilege or right of national citizenship—it is one of the fundamental rights of **personal liberty**, protected by the Constitution of the United States:

> **"Definition and Nature of Personal Liberty.—** The right of personal liberty consists in the power of locomotion, of changing situation or removing one's person to whatsoever place one's inclination may direct without restraint except by due process of law, and in general, to live where and as he pleases."
> **16 CJS "CONSTITUTIONAL LAW"—987, 988.**

Among the "privileges and immunities" of citizens of the United States protected against State action by **Section 2, of Article 4 of the Constitution,** is the right to pass freely, from State to State.

Section 2 of Article 4 of the Constitution reads as follows:

> "**Section 2.** The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.
>
> A person charged in any State with treason, Felony, or other crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.
>
> No person held to Service or Labour in one State, under the laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due."

The right to extradite fugitives from justice and slaves was specifically granted by this Section, because the exercise of the power of extradition was a limitation upon the citizen's right to pass freely from State to State, and the same was true of slaves, because, when the Constitution was written, all states did not recognize

slavery, and it was necessary to protect the slave owner's right to recapture his property.

Section 1 of the 14th Amendment confirmed, and guaranteed the rights of citizenship declared by Section 2 of Article 4 of the Constitution:

> "**Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The "privileges and immunities" of citizens of the United States protected against State action by **Sec. 2 of Art. 4 of the Constitution** included the right to pass freely from State to State:

> "The privileges and immunities so protected are the fundamental privileges of citizenship, **such as the right to pass freely from one state to another.**"
> **16A CJS "CONSTITUTIONAL LAW"—167, 168.**

and, the 14th Amendment confirmed the same "privilege" as an incident to National Citizenship:

> "The privileges and immunities protected by this clause of the Constitution are only those which

owe their existence to the Federal government, in its national character, its Constitution, or its laws, and not such rights as accrue from state citizenship. **These privileges and immunities include the right of ingress and egress from State to State and to the National capital."**
16A CJS "CONSTITUTIONAL LAW"—169, 170.

The right to pass freely from State to State as an incident of NATIONAL citizenship had its origin in Article IV of the Articles of Confederation, and the framers of the Constitution perpetuated the limitations imposed thereby upon the several States by Section 2 of Art. 4 of the Constitution in order to make NATIONAL CITIZENSHIP a reality, as is pointed out in an excellent Essay in **2 SELECTED ESSAYS ON CONSTITUTIONAL LAW, pages 429, 430,** where the learned author says:

"It has never been denied that the right to pass through or reside in any State is included among the "fundamental rights" secured against State action by Article IV, Section 2, of the Constitution, providing that "the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States." It was expressly included in the catalogue of the interstate privileges and immunities, otherwise "fundamental rights" of state citizenship suggested by Mr. Justice Washington, in Carfield v. Coryell (4 Wash. C.C. 371), one of these rights being described by him as follows: "The right of a citizen of one State to pass through, or reside in any other State, for purposes of trade, agriculture, professional pursuits, or otherwise." In later de-

cisions, it has been repeatedly recognized, as in Paul v. Virginia (8 Wall. 168, 180), in Ward v. Maryland (12 Wall. 418, 430) and in United States v. Wheeler (254 U.S. 281).

Article IV of the Articles of Confederation provided: "The better to secure and perpetuate mutual friendships and intercourse among the people of the different States in the Union, the free inhabitants of each of these states, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states; **and the people of each State shall have free ingress and egress to and from any other State.**"

Article IV, Section 2, of the Constitution was drawn with reference to the corresponding clause of the Articles of Confederation and was intended to perpetuate its limitations, a view which, says Mr. Chief Justice White in United States v. Wheeler, has been so conclusively settled as to leave no room for controversy.

* * * * To assume that a State "has power of depriving its own citizens of the right to reside peacefully therein and to free ingress and egress therefrom" is, as said by Chief Justice White in United States v. Wheeler (254 U.S. 281), to announce "that a State could without violating the fundamental limitations of the Constitution other than Article IV, Section 2, enact legislation incompatible with its existence as a free government and destructive of the funda-

mental rights of the citizen." This assumption cannot be entertained."

2 Selected Essays on Constitutional Law—429, 430.

In **Edwards v. California**, 314 U. S. 160, 62 S. Ct. 164, 86 L. Ed. 119, the Court had before it a Statute of California by which that State sought to exclude from its borders itinerant laborers commonly known as "Oakies", but the Court held the Statute unconstitutional as an infringement upon citizens' right to pass freely from State to State as citizens of the United States. Mr. Justice Douglas, speaking (Text: 86 L. Ed. 127-128) for the Court, said:

> "The right to move freely from State to State is an incident of NATIONAL citizenship protected by the privileges and immunities clause of the Fourteenth Amendment against State interference. Mr. Justice Moody in Twining v. New Jersey, 211 U. S. 78, 97, 53 L. Ed. 97, 105, 29 S.Ct. 14, stated, "Privileges and Immunities of citizens of the United States * * * * are only such as arise out of the nature and essential character of the National Government, or are specifically granted or secured to all citizens or persons by the Constitution of the United States." And he went on to state that one of those rights of NATIONAL citizenship was "the right to pass freely from State to State." Id., 211 U.S. p. 97, 53 L. Ed. 105, 24 S. Ct. 14. Now it is apparent that this right is not specifically granted by the Constitution. Yet before the Fourteenth Amendment it was recognized as a right fundamental to the national character of our Federal Government.

* * * So, when the Fourteenth Amendment was adopted in 1868, it had been squarely and authoritatively settled that the right to move freely from State to State was a right of NATIONAL citizenship. As such it was protected by the privileges and immunities clause of the Fourteenth Amendment. * * * * To be sure, there are expressions in the cases that this right of free movement of persons is an incident of STATE citizenship protected against discriminatory State action by Art. 4, Sec. 2 of the Constitution. * * * * The conclusion that the right of free movement is a right of NATIONAL citizenship stands on firm historical ground."

Mr. Justice Jackson in the same case (Text: 86 L. Ed. 130) said:

"This court should, however, hold squarely that it is a privilege of citizenship of the United States, protected from State abridgement, to enter any State of the Union, either for temporary sojourn or for establishment of permanent residence therein and gaining resultant citizenship thereof. If National citizenship means less than this, it means nothing. * * * Unless this Court is willing to say that citizenship of the United States means at least this much to the citizen, then our heritage of constitutional privileges and immunities is only a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will."

The rights enjoyed by American citizens as incidents

of NATIONAL CITIZENSHIP apply to all citizens, wherever they may be:

> "The rights which a citizen enjoys by reason of his United States citizenship are protected against the action of his own state as well as against that of other states in which he may happen to be; the provision applies to all citizens of the United States, wherever domiciled and a state cannot abridge privileges of a citizen of the United States even though he is a resident of the State which undertakes to do so."
>
> **16A CJS "CONSTITUTIONAL LAW" — 172.**

When JOSEPH O'NEILL came to Florida in April, 1956, he was exercising one of the fundamental rights of personal liberty, secured to him by the Constitution of the United States, and in the exercise of that right, he was entitled to remain in Florida as long as he chose, and to depart, and return to his home in Illinois, or to go to any other destination whenever he chose to do so, and we submit that sub-sec. 3 of Sec. 942.02, Fla. Stat., insofar as it attempted to authorize any court of this State, upon the showing provided therein to order him "to be taken into immediate custody and delivered to an officer" of any other State, to be deported as a prisoner, against his will, to New York or any other state, was a clear infringement of his right to pass freely from State to State, and a serious impairment and abridgment of his fundamental right of personal liberty, guaranteed and protected by the Constitution of the United States.

The States of the Union Possess no Power, even to Surrender a Fugitive from Justice to a sister-state except such Power as is Conferred by Sec. 2 of Art. 4 of the U.S. Constitution, and have no Power Whatever to Surrender Any Citizen to a Sister State Unless That Power is Conferred by the U. S. Constitution.

Petitioner's counsel apparently contends that the several states of the Union have power under principles of comity, to surrender to a sister state any citizen within their borders merely upon request of such sister state, whether such person is charged with commission of a crime in the demanding sister state or not. In this, we submit that counsel is in error: we submit that it is settled beyond controversy, doubt, or even debate, that none of the States of the United States has or possesses any power such as independent nations possess, to surrender criminals to other nations as a matter of favor or comity, and that the several states have no power even to surrender to a sister state a fugitive from justice, except the power conferred by Section 2, of Art. 4 of the Constitution, and in the absence of a provision of the Federal Constitution authorizing a state to forcibly seize and arrest a citizen not charged with any crime, and to deliver him as a prisoner to officers of a demanding sister state, no such power exists, and hence, Sub. Sec. 3 of Sec. 942.02, Fla. Stat. is unconstitutional and void.

In **State v. Quigg**, 91 Fla. 197, 107 So. 409, Judge Strum, speaking (Text 411) for that Court said:

"Proceedings in extradition are sui generis, finding their origin and existence as between differ-

ent nations, wholly in treaty obligations, and as between the states of this Union wholly by virtue of the provisions of the Constitution of the United States and effectuating statutes. The Constitution of the United States, art. 4, sec. 2, provides:

> "A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime."

* * * * *

Authority for interstate rendition of fugitives by extradition emanates solely from the power delegated to the federal government by the Constitution of the United States. In this state, such proceedings are wholly dependent upon the organic and statutory law just quoted. Legislation as to interstate rendition of fugitives being within the power of Congress, the federal law upon that subject is paramount to state Constitution and statutes. Ex parte Massee, 79 S.E. 97, 95 S.C. 315, 46 L.R.A. (N.S.) 781. When the executive warrant of rendition has been issued, the fugitive is then held solely upon that authority."

In **State v. Chase**, 91 Fla. 413, 107 So. 541, Mr. Justice Brown, speaking (Text 542-543) for that court plainly stated that "**Without these** (i.e., the Federal Constitutional

provision, and federal effectuating Statutes) **there would be no such thing as interstate extradition.**" He said:

> "As was said by this court, speaking through Mr. Justice Strum in the case of State ex rel. Stringer v. Quigg et al., 107 So. 409, decided at the present term:
>
> > "Proceedings in extradition are sui generis, finding their origin and existence, as between different nations, wholly in treaty obligations, and as between the states of this Union, wholly by virtue of the provisions of the Constitution of the United States and effectuating statutes."
>
> "The provision of our federal Constitution on this subject (Article 4, § 2) is in general terms, but the act of Congress (Section 5278, U.S. Rev. Stat.) (Section 10126, U.S. Comp. St. 1) is more specific. * * * * * * * * * * * * * * *
>
> "It must be conceded that this question of interstate extradition must be controlled by the provisions of the federal statute and the effectuating act of Congress above referred to. **Without these, there would be no such thing as "interstate extradition" and no harmony in the law governing the subject.** State ex rel. Stringer v. Quigg, supra; Kuney v. State (Fla.) 102 So. 547."

In 35 CJS "Extradition"—319, speaking of the basis for the power of one state to extradite a fugitive criminal from a sister state, the text says:

"It is not dependent on interstate comity, courtesy or contract."

And in 22 Am. Jur. "Extradition"—247, 248, the text states the same principle:

"When the present Constitution of the United States was adopted, it was provided that 'a person charged in any state with treason, felony or other crime who shall flee from justice and be found in another state, shall on demand of the executive authority of the State from which he fled be delivered up to be removed to the state having jurisdiction of the crime.' By this clause the power to regulate interstate extradition is delegated to the Federal Government, and in pursuance thereof laws of Congress have been passed specifying the judicial acts which are necessary to authorize a demand, * * * * . **Hence, as respects fugitives from justice** from one state to another, **their extradition is,** of course, **a matter which is controlled by the United States Constitution and is not dependent on comity or contract, and no person can be surrendered by one state to another unless the case falls within the provisions of the United States Constitution and the acts of Congress under it.**"

State and Federal Courts have repeatedly held that the states possess no power to surrender even criminal fugitives from justice upon principles of favor, comity or contract, and that the right and power to do so emanates solely from Section 2, Art. 4 of the Constitution of the United States and Federal statutes enacted pursuant

thereto, and that "without these, there would be no such thing as interstate extradition:" State v. Chase, supra.

Thus, in **People v. Hyatt**, 122 N. Y. 176, 46 N. E. 825, 60 L.R.A. 774, 92 Am. St. Rep. 706, cited by the Supreme Court of Florida in **ENNIST v. BADEN** (Fla) 28 So. 2d. 160, text 162, the Court held:

> "The extradition of a fugitive from justice from another State **depends on the provisions of the Constitution of the United States, and not on comity or contract.**"

Cullen, J., speaking (Text 826) for the Court, said:

> "Therefore, it necessarily follows that no person can or should be extradited from one State to another unless the case falls within the constitutional provision, and **that the power which independent nations have to surrender criminals to other nations as a matter of favor or comity is not possessed by the States.**"

Again, in **Ex parte Owen**, 10 Okla. Cr. 284, 136 Pac. 197, Ann. Cas. 1916-A-522, cited by the Florida Supreme Court in **State v. Chase**, 91 Fla. 413, 107 So. 541, the Court held:

> "The power which independent nations have to surrender criminals to other nations as a matter of favor or comity is not possessed by the States of the Union; and no person can be surrendered by one State to another unless the case falls within the provisions of the Constitution and laws of the United States."

In **People ex rel Kopel v. Bingham**, 102 NYS 878, affirmed, 189 N.Y. 127, 81 NE 773, the Court said:

> "It seems to have been held by the Court of Appeals in People ex rel Corkran v. Hyatt, 172 N. Y. 176, 64 NE 825, 92 Am. St. Rep. 706, that no person can or should be extradited from one State to another unless the case falls within the Federal Constitution or Statutes and that **the power which independent nations have to surrender criminals to other nations as a matter of favor or comity is not possessed by States.**"

In **Ex parte Montgomery**, 244 Fed. 967, the Court said:

> "The right of extradition is not founded on any State Statute, comity or contract, but upon the Constitution and laws of the United States. Cockran v. Hyatt, 172 N. Y. 176, 64 N. E. 825, 60 L.R.A. 774."

In **Ex parte Thompson**, 85 N. J. Eq. 221, 96 Atl. 102, Text 105, the Court said:

> "The right of a State to demand the extradition from another State of persons who have committed offenses against its laws, but who flee to such other state, is founded upon the Constitution of the United States, **and is not dependent on interstate comity, courtesy or contract.**"

Finally in **Ex parte Morgan**, 20 Fed. 298, the Court (Text 309) said:

> "Interstate extradition is regulated by law. No such power can ever be exercised by the Chief Executive of a State on the ground of comity. Rorer, Interstate Law, 225. Nor has it ever been, in this country, properly and legally exercised on such ground. * * * * Even before our present form of government came into existence, we find a number of the colonial plantations entering into a **compact** in the nature of a treaty for the extradition of fugitive criminals. If it could be done upon comity alone, why enter into a compact."

The authorities cited leave no doubt that "WITHOUT THESE (i.e., Sec. 2, of Art. 4 of the Federal Constitution, and federal effectuating states) **THERE WOULD BE NO SUCH THING AS INTERSTATE EXTRADITION,**" as the Florida court said in State v. Chase, supra; interstate extradition of fugitive criminals does not depend upon interstate comity, courtesy or contract, but solely upon the Constitution and laws of the United States, and that "the power which independent nations have to surrender criminals to other nations as a matter of favor or comity is not possessed by states of the Union." We respectfully, and confidently submit that if "there would be no such thing as interstate extradition" of criminals, were it not for Section 2 of Art. 4 of the Constitution and Federal Statutes enacted to implement that section, as the Florida court and the authorities generally hold, then it necessarily follows as night follows day that without a Federal Constitutional provision authorizing it, there can be "no such thing as interstate extradition" of witnesses. How can it be argued, or even contended, that altho fugitives from justice could not be extradited from state to state but for the power and authority to do so conferred

by Section 2, Art. 4 of the Federal Constitution and Federal Statutes enacted pursuant thereto, no such authority is required for the interstate extradition of witnesses? That citizens, not charged with commission of any crime, or even suspected of crime, can be seized and arrested and deported to another state as prisoners regardless of their personal liberty.

Counsel for Petitioner cites no authority for such a contention, we submit. **Kentucky v. Dennison,** 24 How. 66, 101—102 mistakenly relied upon by Counsel for Petitioner (Brief: pp. 21-22) pointed out very plainly that Section 2, Art. 4 of the Constitution authorizing interstate extradition of fugitives from justice was born out of the experience of the States under the Articles of Confederation that such a constitutional provision was **NECESSARY** to promote concord and harmony between the several states. If interstate "comity" had been sufficient, there would have been **NO NECESSITY** for Section 2, Art. 4 of the Constitution. We suggest that Petitioner's Counsel has completely misunderstood the effect of the decision in Kentucky v. Dennison, supra—it refutes appellant's argument that any power of interstate extradition exists even in the case of fugitive criminals, except such as is conferred by Section 2, Art. 4 of the Federal Constitution and enabling Federal Statutes.

The fact remains that none of the cases cited by Counsel for Petitioner have held that the several states possess any power to arrest and surrender to a sister state as a prisoner an American citizen not charged with or suspected of any crime—and we confidently predict that no case so holding can be found, while to the contrary the only cases (**In re Allen 49 Pa. D. & C. 631** and **In re O'Neill**

9 Fla Supp 153, and **Application of People of State of New York,** 100 So. 2d 149) which have considered and passed upon the point have held that no such power exists. In the absence of any provision of the Federal Constitution authorizing the interstate extradition of citizens not charged with the Commission of any crime in the demanding State, we submit that no such power exists, and sub-Section 3 of Sec. 942.02 F. S. 1955 is unconstitutional and void.

In the case of In **re Allen**, supra, speaking directly upon this point, the Court said:

> "**Second**: The Statute violates the Fourteenth Amendment to the Constitution of the United States, which provides, inter alia: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . . " Article IV, Sec 2 of the Federal Constitution provides that, "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." Under the Fourteenth Amendment, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."
>
> In some respects there is a difference between privileges and immunities referred to in the Fourteenth Amendment, which are those of citizens of the United States, and those referred to in Article IV of the Constitution, which are those of citizens of States, but with respect to the question before us they are substantially the same.

"In the case of Commonwealth of Massachusetts v. Klaus, 130 N. Y. Supp. 713, above referred to, the opinion filed is not a decision of a New York court of final appeals, but of the Appellate Division of the First Department of the New York Supreme Court. Although two judges in that court held the act constitutional, they seem to have been influenced in their decision by the thought that a number of other States had passed a similar law. The court said (p. 715):

"So if the Legislature of this State has in this instance passed an unconstitutional law, a number of other states have fallen into the same error. There can be no doubt that it is a duty which every man owes to society, to give evidence, when called upon to do so in a court of justice, with some few exceptions not relevant here."

Of course the fact that other States have adopted a similar act does not insure its constitutionality, nor is the fact that under proper circumstances a man is under duty to give testimony conclusive of the legal proposition that he may be compelled to leave his State and go to some other State to testify viva voce.

In his dissenting opinion in that case, Judge Laughlin answered the reasoning of the majority opinion conclusively when he said (P. 721):

"The police power of the state has no bearing on the question under consideration, for no

charge is made against Peale personally. The right of the State to summon before its courts, in the administration of the public justice of the state, persons found within the state, whether citizens, residents, or non-residents, is quite clear, as is also the right, in the interest of comity between states and nations, to provide for the taking of testimony within the state for use without the state, and these rights are exercised by all sovereign states and countries. The right, however, attempted to be conferred by this statute is quite different. It is to compel one to leave the state, whom the state could not prevent from entering, and then to punish him for his failure to do something beyond the jurisdiction of the state and of the judge whom it is attempted to authorize to inflict the punishment."

Judge Laughlin was of the opinion that the challenged Act "violates the provision of the Federal Constitution prohibiting the states from enacting any law abridging the privileges and immunities of citizens of the United States."

Judge Laughlin is not the only judge in New York who has held the challenged act unconstitutional. In In re Commonwealth of Pennsylvania, 90 N. Y. Supp. 808, Judge Blanchard denied a motion for a subpoena directing a citizen and resident of New York to appear and testify as a witness in a criminal case pending in a court of the State of Pennsylvania, saying:

"I can see no grounds upon which this Statute can be sustained, and none is urged by counsel for the moving party." Judge Blanchard was of opinion that it would deprive the proposed witness of his liberty without due process of law.

Third: The statute violates the clause in the Fourteenth Amendment to the Federal Constitution, which provides: "..... nor shall any State deprive any person of life, liberty, or property, without due process of law....."

Judge Laughlin in his dissenting opinion in Commonwealth of Massachusetts v. Klaus, supra, very well said (P. 270):

"The mere fact that the formality of appearing before a **judge** is required does not materially change the situation, for it has been attempted to confer authority on a judge of this state to issue a subpoena against a person produced before him within this state, commanding such person to leave the state and attend as a witness before a court in a state, within the territorial limits of which neither the Legislature nor the judge of this state has any jurisdiction. The attempt to confer authority on the judge to punish a failure to comply with such a subpoena as for a contempt of court is without authority. There can be no contempt of a court, except it be a failure to do something that the court has authority to require to be done, and it must be with respect to the administration of the law within this state."

* * * * * * * * *

"The Statute under consideration with its provisions for taking a witness into custody and delivering him bodily over to authorities from a foreign jurisdiction is, in our opinion, clearly unreasonable and unwarranted. A person charged with a crime can be taken from one State to another in order that he may be punished for the crime. It is significant that the clause in the Federal Constitution which reads as follows: "A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the Executive Authority of the State having Jurisdiction of the Crime"; is part of Section 2 of Article IV of the Federal Constitution and it immediately follows and thus qualifies the opening sentence of that section which guarantees to the citizens of each State all the privileges and immunities of citizens in the several States.

The authority for extradition is found in the Federal Constitution and the Federal statutes passed pursuant thereto. See R.S. par. 5278, 18 U.S.C. par. 662, Roberts v. Reilly, 116 U.S. 80, 94 (1885), and Innes v. Tobin, 240 U.S. 127, 131 (1916). It would seem that if it required a provision of the Federal Constitution to provide for the compulsory transfer of a person charged with a crime from one State to another, a fortiori, an act for the compulsory transfer of an innocent person from one State to another for the purpose of giving viva voce testimony should have like express constitutional authority, and that the Act should permit the proposed witness to

enter his recognizance as in extradition proceedings. A fugitive from justice or a person in this State charged with a crime in another state is allowed to enter bail unless the crime with which he is charged is punishable by death or life imprisonment: Act of April 21, 1927, P. L. 327, sec. 16. Surely, it is not due process of law to protect the liberty of criminals and fugitives from justice to a greater degree than the liberty of honest and law-abiding citizens of this state."

We submit that Sub-Sec. 3 of Sec. 942.02 is clearly unconstitutional and void because in the absence of a provision of the Federal Constitution, extending interstate extradition to include mere witnesses, in addition to fugitives from justice, no power exists in the State of Florida or any other State to forcibly arrest and seize a citizen not charged with commission of any crime, and to deliver him as a prisoner into the immediate custody of officers of another State to be transported against his will, as a prisoner to a distant state.

Sub-Section 3 of Sec. 942.02 F.S. 1955 Violates the 14th Amendment to the Constitution of the United States in Denying Due Process of Law.

Sub-Section 3 of Section 942.02 F.S. 1955[1] provides

[1] *Sub-section 3, of Section 942.02* reads as follows:
"If said certificate recommends that the witness be taken into immediate custody and delivered to an officer of the requesting state to assure his attendance in the requesting state, such judge may, in lieu of notification of the hearing, direct that such witness be forthwith brought before him for said hearing; and the judge at the hearing being satisfied of the desirability of such custody and delivery, for which determination the certificate shall be prima facie proof of such desirability may, in lieu of issuing subpoena or summons, order that said witness be forthwith taken in custody and delivered to an officer of the requesting state."

that the Judge of the Florida court upon "being satisfied of the desirability" of the immediate delivery of the witness into the custody of the officers of the requesting State, may "order that said witness be forthwith taken into custody and delivered to an officer of the requesting State."

Section 22 of the Declaration of Rights of the Constitution of Florida in the language of the **Fourth Amendment to the Constitution of the United States** provides that no warrants shall be issued, "but on probable cause" and "supported by oath or affirmation" while **Section 12 of the Declaration of Rights** and like its Federal counterpart the **14th Amendment** to the Constitution of the United States, both provide that "no person shall be * * * deprived of * * * liberty * * * without due process of law."

The particular provision **(Sub. Sec. 3 of Sec. 942.02)** under discussion does not require any statement under oath, of facts which would constitute "probable cause", for an "order that said witness be forthwith taken into immediate custody and delivered to an officer of the requesting State" to be transported out of Florida to a distant State as a prisoner in the custody of such officer. All that is required is that the judge of the requesting state "recommend" it, and that the judge of the Florida court be "satisfied of the desirability" of such an order. If such a provision complies with the ancient Constitutional guaranty which requires all warrants to be based upon affidavits showing "probable cause" for the prisoner's arrest and detention, or with the basic requirements of "due process of law" then human liberty hangs by a thread, and our boasted Constitutional guarantees are but a fool's delusion.

Take the case at bar as a perfect example:

The "Certificate" (R: 1-3) which is the basis for an "order that said witness be forthwith taken into custody and delivered to an officer of "The State of New York, opens with these words:

> "Upon reading the annexed affidavit of Francis X. Clark * * * I, Mitchell D. Schweitzer, Judge * * * do hereby certify * * *"

and said "certificate" closes (R: 3) with this "recommendation":

> "AND I DO HEREBY RECOMMEND that the said Joseph C. O'Neill be taken into immediate custody and delivered to an officer of the State of New York to assure his attendance in New York."

Thus, said "Certificate" (R: 1-3) recites that it is made **"upon reading the annexed affidavit** of Francis X. Clark" (R: 6-9) so we should examine that affidavit to see whether any "facts" are stated therein which would support such a "recommendation". The only possible basis for such a recommendation is this paragraph (R: 7) of Clark's affidavit:

> "The District Attorney's office has made efforts, all without success, to secure the attendance of Joseph C. O'Neill as a witness before the said Grand Jury. Joseph C. O'Neill has consistently refused to appear to testify. His home and office are in Chicago, Illinois. Illinois has no re-

ciprocal witness statute. Therefore, the District Attorney's office has been powerless to compel Joseph C. O'Neill's attendance by court process."

and on the next page (R: 8) this lone sentence:

"The attendance of the said Joseph C. O'Neill before the said Grand Jury cannot be ensured voluntarily."

These bare conclusions are copied "parrot-like" into the "certificate", as will appear from an examination (R: 1-3) thereof. As we have pointed out—no evidence was offered at the hearing in the Circuit (risi prius) Court, so the "recommendation" of necessity rests upon the two paragraphs (R: 7 and 8) quoted above. Are those paragraphs a sufficient statement of FACTS to support an order that the witness be taken into "immediate custody" and be "delivered to officers" of the State of New York as a prisoner, to be transported from Florida to New York as a prisoner? We submit that it is not. In **CONRAD v. VAN BUREN, Circuit Judge,** 144 Mich. 492, 108 N.W. 347, Blair, J., speaking (text 348-349) of the FACTS necessary to support an order or writ for the arrest of a person said:

"The Constitution of the state (Article 6, § 26) provides that "no warrant to search any place or to seize any person or things shall issue without describing them nor without probable cause, supported by oath or affirmation." * * * * The facts to be stated in the affidavit must be given in the same way as on the stand, by a distinct averment of each fact upon knowledge, and the

facts must be such as in law tend to make out the cause of complaint. It is not for the party to draw his own inferences. He must state matters which would justify others in drawing them. The rules heretofore laid down in this court, have always required the facts themselves to appear upon knowledge. No other rule would preserve the constitutional right against warrants not based on probable cause, supported by oath or affirmation. Const. art. 6, § 26; Proctor v. Prout, 17 Mich. 473." In Sheridan v. Briggs, 53 Mich. 569, 19 N. W. 189, Mr. Justice Champlin, delivering the unanimous opinion of the court, says: "The principle deducible from these cases is that an affidavit which is used as the basis of a writ which will deprive a person of his liberty, must not only set forth the facts and the circumstances in detail, and not conclusions or inferences from facts, but they must be facts within the personal knowledge of the deponent. * * * * * If the deponent was called to the witness stand for the purpose of proving the falsity of the representations, it would not be competent for him to testify in the general, loose, and vague manner contained in his affidavit. Such testimony would not be admissible to establish the fact that the representations made were false. The affidavit upon which a person is held to bail must be of the same legal quality, as evidence, as would be required at the trial to establish the facts set up or relied on for cause of arrest. * * * * What would be quite sufficient in a pleading would, in most instances, be entirely insufficient in an affidavit to hold to bail. The

> reason is obvious. In pleading, the evidence is not required to be set forth. But no arrest can be made except upon sworn evidence of facts."

Let us test the statements contained in Clark's affidavit (R: 7-8) and in the Judge's "certificate" (R: 1-3) by this rule: The "statement" is:

> "The District Attorney's Office has made efforts, without success, to secure the attendance of Joseph C. O'Neill as a witness before the said Grand Jury. His home and office are in Chicago, Illinois. * * * The attendance of the said Joseph C. O'Neill before the said Grand Jury cannot be ensured voluntarily."

What "efforts" were made to secure O'Neill's attendance before the Grand Jury are not stated. Did anyone actually, personally ask him to go to New York to appear as a witness before the Grand Jury, and if so, did he refuse to do so? No such statement appears either in Clark's affidavit (R: 6-9) or the Judge's Certificate (R: 1-3). Did any one actually ask O'Neill to go to New York, and offer to pay him his reasonable traveling expenses, or any part thereof? Not according to Clark's affidavit. Did they ever issue a witness subpoena for O'Neill and try to serve it in New York? For all that is shown by Clark's affidavit (R: 6-9) no attempt has ever been made to serve him, nor is it stated that he had never been in New York; it is not even stated that O'Neill had NOT BEEN IN NEW YORK shortly before coming to Florida. The statement that "The District Attorney's office has made efforts without success to secure the attendance of Joseph C. O'Neill as a witness" is a bald, unsupported conclusion, without a

single FACT stated to support it, as is the statement that his attendance "cannot be ensured voluntarily." The State of New York sought an order under sub-section 3 of Sec. 942.02 to take O'Neill back to New York in chains, like a common criminal. Doubtless the District Attorney had in mind the "softening" effect of such a harrowing experience upon the witness—he would be much more "pliable" when they finally got him there. Hence it was "desirable" that he be taken into immediate custody and delivered to the officers of the State of New York as a prisoner to be returned as though he were an escaped felon. If this constitutes "probable cause" or "due process of law", then those terms are nothing but meaningless legalistic jargon.

Due Process requires that civil remedies for seizure of property be granted only upon affidavit stating facts—at least such showing should be required to authorize seizure of person.

The Statute (Sub. Sec 3 of Sec 942.02) nowhere requires any showing of "necessity" for an order to take the witness into immediate custody, for delivery to officers of the requesting State, to be transported to such state as a prisoner. The only requirement is that the judge find it to be "desirable"—that he be "satisfied of the desirability of such custody and delivery". "Desire" means "ordinarily, to wish for more or less earnestly". See: **Black's Law Dictionary** 566, or "to wish or long for; crave; want; also to need or require; to express a wish to obtain, ask for, request." See: **1 New Century Dict. 405.** "Desirable" is defined as: "Worthy to be desired; pleasing, excellent, or fine, n. one who or that which is desirable." In order to obtain a writ or order for the seizure of property

for an injunction or receiver, a showing of "necessity" is required. The grounds of attachment (Sec. 76.04 FS 1955) and garnishment (Sec. 77.03 FS 1955) are based upon a showing of "necessity" for the writ. Even a Writ of Replevin requires (Sec. 78.06 FS 1955) an affidavit stating FACTS in order to obtain the writ. An injunction can only be obtained upon a showing of "necessity", as this court held in **Crawford v. Bradford**, 23 Fla. 404, 2 So. 782: "Where no **necessity** is shown for the injunction * * * it should not be granted." In 28 **Am. Jur. "Injunctions" 217**, the rule prevailing in Florida and other American jurisdictions is well stated:

> "The extraordinary character of the injunctive remedy and the danger that its use in improper cases may result in serious loss or inconvenience to an innocent party require that the power to issue it should not be lightly indulged in, but should be exercised sparingly and cautiously, only after thoughtful deliberation, and **with a full conviction on the part of the Court of its URGENT NECESSITY.** In other words, the relief should be awarded only in clear cases, reasonably free from doubt, AND WHEN NECESSARY, to prevent great and irreparable injury." (Emphasis supplied)

Receivers cannot be appointed without a showing of "necessity": **Mirror Lake Co. v. Kirk Securities Corp.** 98 Fla. 946, 124 So. 722: **Apalachicola Northern R. Co. v. Sommers**, 79 Fla. 816, 85 So. 361; **Therrell v. State Life Ins. Co.** 107 Fla. 450, 145 So. 220. None of these remedies, involving seizure or interference with property are available upon a mere showing "of the desirability" of such process; a suitor must show a "necessity" before the

Courts will act even to infringe upon property rights, and we submit that "due process of law" under **Section 12 of the Declaration of Rights of the Constitution of Florida** and the **14th Amendment** requires at least as strong a showing to sustain an order or process for the arrest and imprisonment of an American citizen, especially if he is not charged with commission of any crime. **See: Conrad v. Van Buren, Circuit Judge,** supra.

> "The due process clause of the Constitution of the United States avouches the right to be free of arrest save on probable cause, and assures the right to be at liberty and to be imprisoned only for cause."
>
> **16A CJS "Constitutional Law"—634.**

We have shown that no FACTS were stated, either in the affidavit of Francis X. Clarke (R: 6-9), nor in the Certificate (R: 1-3), based thereon showing any need, necessity, cause, or probable cause for entry of an order for immediate custody, and we submit that the Statute (Sub-Sec. 3 of Sec. 942.02 FS) is unconstitutional, and violates Section 22 of the **Declaration of Rights of the Constitution of Florida,** because it does not require any showing of "probable cause" to be made upon "oath or affirmation", and for the same reason, violates the "due process" clause of **Section 12 of the Declaration of Rights** and the **14th Amendment** to the Constitution of the United States. The fundamental right of personal liberty, one of the greatest "human rights" guaranteed and protected by the Constitutions of the State and Nation, certainly should be as precious, and entitled to as much protection as the "property rights" protected by those same constitutional provisions.

The Statute Clearly Violates the 14th Amendment to the Constitution of the United States in failing to provide for bail.

The Statute (Sub-sec. 3 of Sec. 942.02 FS) is unconstitutional and void because it does not provide for nor permit bail, but instead attempts to provide for and authorize the entry of an order "that said witness be forthwith taken in custody and delivered to an officer of the requesting State", to be transported as a prisoner to a distant state with no provision for bail conditioned even upon the witness' appearance in the requesting State: We submit that this feature of the Act renders it a flagrant violation of Section 9 of the Declaration of Rights of the Constitution of Florida and the Eighth Amendment to the Constitution of the United States which guarantee the citizen's right to bail:

> "All persons shall be bailable by sufficient sureties, except for capital offenses where the proof is evident or the presumption great."

In **Ex parte McDaniel**, 86 Fla. 145, 97 So. 317, McDaniel had been convicted of assault with intent to commit murder in the second degree, and released on bond pending hearing on his motion for new trial. When his motion came on to be heard, however, he failed to appear, and his bond was forfeited, and he was arrested and confined to jail without bond. It was contended that because he had failed to appear, he was properly denied bail, but this court held that he was entitled to bail as a matter of right, and that a denial of bail "is a deprivation of liberty without due process of law:"

It may be that there are circumstances under which the right to bail in otherwise bailable causes would be forfeited by breach of prior bonds. 6 C.J. par. 180, p. 962; Lee's Case No. 8,150, 15 Fed. Cas. p. 136, 22 Leg. Int. 284, 6 Phila 96. But this is not a case in which the facts warrant a resort to this principle. There may have been grounds for punishment for contempt, but there was no such conduct upon the part of petitioner in the way of flagrant disregard of the court's authority or effort to evade its processes as to forfeit his constitutional right to bail during a recess of several weeks or for an indefinite period of the trial court."

In **Bozovichar v. State** (Ind.) 103 N.E. 2d. 680, the Supreme Court of Indiana said:

"The denial of the right to give bail where the proof of guilt is not evident or the presumption of guilt strong would be a deprivation of liberty without due process of law, in violation of the Constitution, which would call for prompt corrective action. Ex parte McDaniel, 1923, 86 Fla. 145 97 So. 317."

In 6 Am. Jur. "Bail and Recognizance"—66, it is said:

"The practical effect of constitutional and statutory provisions of various states is to make the allowance of bail mandatory in non capital cases. Indeed, a grant of bail cannot be prohibited by the legislature when the fundamental law contains the customary guaranty of the right to bail."

6 Am. Jur. "Bail and Recognizance"—66.

As we have pointed out earlier [this Brief, pages: 4-6] neither the Cooper case (**In re: Cooper**, supra) nor the Saperstein case (**In re Saperstein**, supra) involved **Sub-Sec. 3 of Section 942.02 FS**, and the constitutionality of the particular provision of the Act here under consideration was not before the Court, and was not considered or decided, and we invite the Court to examine those opinions, from which it will be clear that neither sustains the Constitutionality of **Sub-Section 3 of Sec. 942.02 FS.**

The sum and substance of the argument of Appellant's counsel seems to be that the supposed necessity for securing witnesses in criminal cases in other states is so great as to justify the courts in over-riding and ignoring all safe-guards and guarantees in favor of citizens granted both by State and Federal Constitutions—in other words: the end justifies the means, no matter what becomes of the prized liberties of American citizens. We cannot, we refuse to believe that this argument is sound. In the interest of crime-prevention, it might be "desirable" to abolish the Union of States, and in its place erect a single state, extending from the Atlantic to the Pacific, and from Canada to the Gulf of Mexico, with no boundaries to limit or impede process of courts, but no such revolution has occurred, and, as long as the United States and the several states exist as we have known them, they must exist subject to the limitations and restrictions imposed by the Constitution of the United States, and the Constitutions of the several states, which we submit forbid any such strong-arm procedure as is attempted to be provided by **Sub-Section 3 of Sec. 942.02 FS 1955.**

The State of Florida Cannot Constitutionally Enact a Statute Authorizing Issuance of Criminal Process Beyond the Limits of this State.

We submit that **Section 942.02 F.S. 1955** does in law and fact constitute an attempt to confer upon the courts of Florida power to issue process running beyond the territorial limits of this State. The plain, simple unambiguous language of **Sub-sec. 2 of Section 942.02 Fla. Statutes** says:

> "If at a hearing the judge determines that the witness is material and necessary * * * **he shall issue a summons * * * directing the witness to attend and testify in the court * * *** where a grand jury investigation has commenced * * * **at a time and place specified in the summons.**"

If this is not an attempt to authorize the issuance of a witness subpoena running beyond the limits of this State, then words are meaningless.

Sub-Sec. 3 of Sec. 942.02 constitutes an equally bold attempt to authorize the courts of this state to issue process in the form of an order "that said witness beforthwith taken into custody and delivered to an officer of the requesting State"—in plain words, it attempts to authorize the courts of Florida to issue a WARRANT, conferring legal authority upon an officer of another state to hold a citizen, not charged with any crime, in his custody as a prisoner during a journey beyond the limits of the State of Florida until the officer arrives in the state from whence he comes with his unwilling pris-

oner. If these two sub-sections do not attempt to confer upon the courts of Florida power to issue process running beyond the limits of this State, then we frankly confess that we are incapable of understanding plain, unambiguous English language.

We submit that this proposition is so clear, and beyond the realm of debate that it should not be necessary to cite authority to sustain it.

> "No sovereignty can extend the process of its courts beyond its territorial limits; nor can a tribunal established by a state extend its process beyond the territorial limits of the State."
>
> **72 CJS "Process"—997**
>
> **Note 75, citing inter alia:**
>
> **Beckwith v. Bailey**
>
> **119 Fla. 316, 161 So. 576.**

And:

> "A warrant of arrest issued in one state may not be executed in another state, for it has no validity beyond the boundaries of the state by whose authority it was issued."
>
> **3 Fla. Jur. "Arrest"—55,**
>
> **Note 5, citing:**
>
> **Passet v. Chase, 91 Fla. 522, 107 So. 689,**
>
> **and also citing:**
>
> **Opinions of Attorney General**
>
> **1951 - 1952, page 764.**

The Biennial Report of Hon. Richard W. Ervin, as Attorney General of Florida for 1951-1952, on page 764 says:

> Questions: 1 Does a Florida municipal police officer have authority to serve a warrant in Florida which is issued in another State?
>
> **Answer—As to Question One:**
>
> "An Arrest Warrant issued in one State may not be executed in another State, for **it has no validity beyond the boundaries of the State under whose authority it was issued.** (4 Am. Jur. 14, Arrest, Par. 19; Passett v. Chase, 107 So. 689). This rule applies to all kinds of arrest warrants, including bench warrants."

Pennoyer v. Neff, 95 U.S. 714, has been the leading authority for the proposition that process cannot run beyond State territorial limits:

> "The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside its territory except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions. "Any exertion of authority of this sort beyond this limit," says Story "is a mere nullity,

and incapable of binding such persons or property in any other tribunals." Story, Confl. L., Sec. 539."

Field, J., in Pennoyer v. Neff,
95 U. S. 714,
24 L. Ed. 565, text, 568-569.

In 4 Am. Jur. "Arrest", Sec. 19, page 14, cited by the learned Attorney General in his opinion, we find this:

"§ 19. **Execution of Warrant in State Other than That in Which It was Issued.**—A warrant of arrest issued in one state may not be executed in another state, for it has no validity beyond the boundaries of the state by whose authority it was issued. A warrant may confer authority on a police officer or private individual to make an arrest anywhere within the boundaries of a state, but it has no extraterritorial effect of any kind, and will not justify an arrest made outside the limits of the state."

In **Beckwith v. Bailey**, 119 Fla. 316, 161 So. 576, Mr. Justice Davis, speaking for this court (Text 581) said:

"In the present case no personal service was had upon Bailey sufficient to invoke the application of the full-faith and credit clause of the federal Constitution and the laws of Congress enacted thereunder, because no state can issue process to be made effective beyond its own borders, although such process be sent beyond the borders of the state of forum and there served."

In **Passet v. Chase**, 91 Fla. 522, 107 So. 689, Passett had been arrested and jailed by Chase, as Sheriff of Dade County acting under a bench warrant issued by and out of the Supreme Court of the District of Columbia; he applied for a writ of habeas corpus, and the Circuit Judge denied his motion for discharge, and remanded him to the custody of the Sheriff. This Court **reversed** the Circuit Court, and ordered Passett's discharge from custody. Brown, C. J., speaking for this Court (Text 691-692) said:

> "It is plain that this bench warrant and indictment only authorized an arrest by a United States marshal or his deputy within the territorial jurisdiction of the court issuing it, as indicated by its language; that is, within the District of Columbia. It is too well settled to requirt citation of authority that a warrant of arrest issued in one state may not be executed in another state, for it has no validity beyond the boundaries of the state by whose authority it was issued. * * * This question was decided by the Court of Appeals of the District of Columbia, in the case of Palmer v. Thompson, 20 App. D.C. 273. * * *

This was a habeas corpus case appealed from the Supreme Court of the District of Columbia discharging Thompson from the custody of the United States marshal, and the decision of the lower court was affirmed. In the body of the Opinion it is said:

> "But, in the absence of specific statutory enactment to that effect, it is undoubtedly the

general rule of law that no court has authority or jurisdiction beyond the territorial limits of the district for which it has been established, notwithstanding that it may be, as in the present case, only one of numerous similar courts of the same sovereignty. No court can by its writ impose a duty upon an officer outside of those limits. It may well be that, under exceptional circumstances, it may direct its own officer for some specific purpose to go outside of its own territorial limits; but we cannot understand how it can assume any authority under the general powers vested in it to issue its precept to the officer of another jurisdiction, when it has no power to enforce the performance of the duty. We do not mean to be understood as saying that Congress may not grant this authority. * * *"

It therefore appears that the warrant with indictment attached, issuing from the Supreme Court of the District of Columbia not only conferred no authority upon the sheriff of Dade County, Fla. to arrest the plaintiff in error, but it conferred no such authority upon the United States Marshal for that federal district had he attempted to make such arrest thereunder.

It would appear from the foregoing that the plaintiff in error was unlawfully restrained of his liberty, and that he was clearly entitled to be discharged from custody, provided the said court before which the habeas corpus proceedings were brought had jurisdiction to that end."

In **Kirkes v. Askew, Sheriff,** 32 F. Supp. 802, Kirkes sued the Sheriff, Askew, an officer of the State of Oklahoma, for damages for plaintiff's detention in an Arizona jail. Kirkes had been charged with a crime in Oklahoma, and a warrant was issued in Oklahoma for his arrest. Askew, in Oklahoma, by telegram, requested the Sheriff of Yuma County, Arizona to arrest and hold plaintiff, which he did. Plaintiff agreed to waive extradition, and defendant Sheriff proceeded with the Oklahoma warrant to Yuma County, Arizona, where he found plaintiff in jail waiting for him, and "thereupon defendant Sheriff formally executed said warrant." The Court said:

> "The law of Oklahoma and the law generally is that a warrant of arrest issued in one state may not be executed in another state, for it has no validity beyond the boundaries of the state by whose authority it was issued. (Citing cases, including Passett v. Chase, Sheriff, 91 Fla. 522, 107 So. 689) the Sheriff of Latimer County, (Oklahoma) when he attempted to execute the warrant by arresting plaintiff in Arizona, was acting beyond any authority conferred upon him by said warrant, and beyond the scope of any authority conferred upon him as a sheriff under the laws of Oklahoma. He had no authority to direct that the plaintiff be detained in jail while he, the Sheriff, went to San Francisco. * * * * The fact that the County paid the Sheriff for the trip to Arizona did not, and could not, add to the authority of the sheriff and authorize him to execute a criminal warrant outside the State of Oklahoma. If the allegation of the complaint * * * * may be construed to mean that the County

Attorney of Latimer County ordered the Sheriff to go to Arizona, the same conclusion must be reached, **for the State of Oklahoma does not purport to authorize the County Attorney to go to another State, arrest a person and return him to the State. IF THE STATUTE PURPORTED SO TO DO, IT WOULD IN OUR OPINION BE INVALID.**" (Emphasis ours)

In **McLean v. State of Mississippi** (CCA-5) 96 F. 2d. 741, 119 ALR 670, cert. den 305 U.S. 623, 59 S. Ct. 84, 83 L. Ed. 399, Rufus Lee Roy sued McLean, as Sheriff of Bolivar County, Miss., on his official bond. An atrocious murder had been committed in Bolivar County, Miss., and Roy was suspected of the crime. He was arrested in Shreveport, La., and waived extradition, and McLean, the Sheriff, and two deputies went to Louisiana with the prosecuting attorney to return him to Mississippi. McLean, the Sheriff, took Roy to Memphis, Tenn., where he was held in jail for ten days and released because the true murderer was discovered. Roy claimed that brutal "third degree" practices were inflicted upon him while he was in jail in Memphis, and, for the injuries and damage thus sustained, he sued the Sheriff on his bond. The case turned upon whether the Sheriff was acting as Sheriff under color of his office in taking Roy to Memphis, Tennessee or not, and the Court held that he had no status as an officer outside the State of Mississippi, and that whatever he did outside of Mississippi was done as a private person, and not as an officer of the law. SIBLEY, Circuit Judge, speaking (Text 745) for the Court said:

"What is involved is that Roy, having supposedly

committed a crime in Mississippi, had escaped into Louisiana and was to be taken back to Mississippi. That has been provided for by the Constitution and Laws of the United States. The extradition Statute 18 USCA, Sec. 662, 663, gives State Sheriffs no duty or function. The Governors of the two states handle the matter, and the prisoner is to be delivered to and returned by a specially appointed agent and not by the State Sheriff or a United States Marshal. * * * * Even though one who is a sheriff should be appointed such agent, he acts not as Sheriff under his bond, but as special agent to extradite at least until he has the prisoner in his custody in his own county. When in this case, McLean, extradition having been waived, went to Louisiana and took charge of Roy, he did not, because he could not, exert the office of Sheriff of Bolivar County, Miss. **In Louisiana and again in Tennessee he did not, because he could not, act either virtute or colore officii. He had neither office nor color of office as a Mississippi Sheriff while in another State, where Mississippi laws were not in force. * * * IN SUCH OTHER STATE HE IS ONLY A PRIVATE CITIZEN."** (Emphasis ours)

In **Mandeville v. Guernsey** 51 Barb. (N.Y.) 99, affirmed by the New York Court of Appeals in 50 N. Y. 669, it was held:

"The official character of an individual as sheriff in another state, and a bench warrant issued to him as such sheriff upon an indictment found in that state will not authorize him to arrest the

person named therein within this state and carry him beyond its boundaries. In respect to those acts, he is to be treated as a private person acting without legal process.

An arrest of a person within this state, by a private individual, without warrant, made for the purpose of forcibly abducting the arrested person from the State, and followed immediately by such abduction, cannot be justified. Such seizure and abduction, of themselves, constitute a criminal offense of high grade, both at common law and by statute."

In **Collier v. Vaccaro,** (CCA-4) 51 F. 2d. 17, Vaccaro was arrested on a charge of kidnapping, because, after he had lawfully arrested one Price, in Canada, he had forcibly brought him across the border into the United States. The Court, on habeas Corpus held that he was guilty of kidnapping. Circuit Judge PARKER speaking (Text 19-20) for the Court said:

"An unlawful arrest is merely an offense against the peace and dignity of the state; an unlawful carrying of a citizen beyond its boundaries to be dealt with by the laws of another State is a violation of the sovereignty of the former. And it is no defense to the crime of kidnapping that an accused may have thought that he had a right to arrest and carry the person arrested out of the country, or that he did not intend to violate the law. The gist of the offense is the forcible carrying out of the State; and where this intention is shown to have existed it is immaterial that ac-

cused may have thought that he was acting within the law. Ignorantia legis neminem excusat. So far as it (the order below) released him under the commitment on the charge of kidnapping, it will be reversed."

Suppose officers of the State of New York came to Florida armed with an attachment or witness subpoena issued out of the Court of New York, and attempted to execute the attachment, by taking O'Neill into their custody, in Florida: **Passett v. Chase,** supra, settled the proposition that their attachment would be null, void, and ineffectual for ~~any~~ purpose in Florida, and that they would have no power as officers of the law in Florida, and no power to execute or serve any process. If officers of New York attempted to serve even a witness subpoena upon O'Neill in Florida, **Passett v. Chase,** and **Beckwith v. Bailey,** supra, leave no doubt that they would have no power as officers to do so and their subpoena, as process would be void and worthless.

Suppose officers of the State of New York came to Florida to transport O'Neill back to Florida pursuant to an order pursuant to **Sub. Sec. 3 of Sec. 942.02 FS 1955**— whence would they derive any status as officers in Florida? According to **Passett v. Chase,** supra, they would lack any power or authority as officers of the law. According to **McLean v. Mississippi,** they would have "neither office nor color of office as a (New York) Sheriff while in another state, where (New York) laws were not in force. * * * In such other state (Florida) they would be only a private citizen." Even in inter-state extradition cases, as the Court pointed out in **McLean v. Mississippi,** a sheriff or officer of the demanding state HAS NO

POWER, AUTHORITY OR STATUS as a Sheriff or officer of the State from which he came, but only as an Agent specially appointed in the Extradition proceeding—in other words:

Section 2 of Article 4 of the Federal Constitution, and Federal enabling Statutes enacted thereunder, give power and authority in interstate extradition proceedings which otherwise is wholly lacking. In the hypothetical case we have been considering however, there is no Federal Constitutional provision to confer power and authority upon any officer from a demanding state—and without it, the most exalted officer the State of New York could send would be a mere private citizen with no power to arrest or hold O'Neill in his custody, unless such power or authority could be conferred by an order entered by a Florida Court pursuant to **Sub-sec. 3 of Sec. 942.02 FS 1955.** But does the Circuit Court of Dade County have any power or jurisdiction to appoint a private citizen of New York temporarily in this State as a transient, as an officer of the State of Florida? We know of no such authority, and confidently submit that none exists. Therefore, there is no officer of the law into whose custody O'Neill could be placed. Suppose, however, that O'Neill was delivered into the custody of such an "officer" and they started back to New York, and at Atlanta, Georgia, or any place between the Florida and New York line, O'Neill walked away from his captor? The order of the Florida court would no longer be valid as authority to hold him in custody, or recapture him, and any supposed power or authority conferred upon an "officer" of New York would have evaporated at the Florida State line. What would be left? Nothing but plain, unabashed, bald-faced kidnapping under the guise of a legal proceeding.

PETITIONER'S BRIEF

The so-called "Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings," attempts to authorize the seizure and arrest of a citizen not charged, or even suspected of having committed a crime against the laws of any state, and to authorize his deportation as a prisoner in the custody of officers of another state, there to be detained or imprisoned if he cannot make bond until the prosecuting officers decide they have no further need of him. For example, suppose a citizen of Maine came to Florida for a short visit. While in Florida, over a thousand miles from home, he may be seized and arrested upon demand of a court of the State of Washington, although he has committed no crime in the State of Washington nor any other state. Under the provisions of the Act under consideration he may, if a judge in the State of Washington so recommends, "be taken into immediate custody and delivered to an officer" of the State of Washington to be deported across the continent as a prisoner without bail by such route or method of travel as his captors may select. Once in the State of Washington he may be held there for days, weeks or even months: no limit is specified in the Act, which only requires that the judge in the demanding state certify that "his presence will be required for a specified number of days" without placing any limit thereon. Once in the State of Washington it needs no gift of prophecy to forecast that unless the hapless citizen of Maine, a "stranger in a strange land," can procure bail, that he will be imprisoned "to assure his attendance" as a witness when desired. When the hapless citizen is finally released, and discharged from further attendance as a witness, what is to happen to him? The Act is silent—

it takes no further interest in him. It contains no provision providing the hapless citizen with subsistence and transportation back to Maine, or to Florida. It is conceivable that if the officials of the State of Washington were disappointed in his testimony he might be left to get back to his home in Maine the best way he could. Indeed since the Act does not require that he be furnished either subsitence or transportation back to Florida, or to his home in Maine, that no state funds would be available for that purpose. We call attention to the fact that the only provision for the payment of witness fees or mileage is in cases in which a witness is merely "summoned" and not in cases in which the witness is taken into custody and forcibly deported as a prisoner. In using the State of Washington in our illustration, we have no intention of disparaging that great western state: The illustration is equally applicable to every one of the 43 states, including Florida, which have adopted this Act. Unfortunately, there are many citizens who are utterly unable financially to defend themselves from the harsh and arbitrary operation of said Act as is Respondent, Joseph C. O'Neill. We suspect that most, if not all of those who have been subjected to its operation have had to submit silently, and this undoubtedly accounts for the dearth of adjudicated cases considering its constitutional validity.

Petitioner's Arguments Overlook The Effect Of The 14th Amendment.

That part of Section 1 of the Fourteenth Amendment material to a consideration of the arguments advanced by Petitioner reads as follows:

"Section 1.—All persons born or naturalized

> **in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.** * * * * *

In **COLGATE v. HARVEY, 296 U.S. 404, 80 L. Ed. 299, 56 S. Ct. 252, 102 A.L.R. 54,** Mr. Justice Sutherland, discussing national citizenship as recognized by Section 1 of the Fourteenth Amendment, and the privileges and immunities thereof protected against state abridgment by that Section said:

> "Thus, the dual character of our citizenship is made plainly apparent That is to say, a citizen of the United States is **ipso factor** and at the same time a citizen of the state in which he resides. And while the Fourteenth Amendment does not **create** a national citizenship, it has the effect of making that citizenship 'paramount and dominant' instead of 'derivative and dependent' upon state citizenship. * * * * * *
>
> The result is that whatever latitude may be thought to exist in respect of state power under the Fourth Article, a state cannot, under the Fourteenth Amendment, abridge the privileges of a citizen of the United States, albeit he is at the same time a resident of the state which undertakes to do so. This is pointed out by Mr. Justice Bradley in the Slaughter House Case (C.C.) 1 Woods, 21, 28, Fed. Cas. No. 8,408:

"The 'privileges and immunities' secured by the original constitution were only such as each state gave to its own citizens. Each was prohibited from discriminating in favor of its own citizens and against citizens of other states. **But the Fourteenth Amendment prohibits any state from abridging the privileges or immunities of the citizens of the United States, whether its own citizens or any others. It not merely requires equality of privileges: but it demands that the privileges and immunities of all citizens shall be absolutely unabridged, unimpaired.**

* * * *

"Under the Fourteenth Amendment, therefore, the simple inquiry is **whether the privilege claimed is one which arises in virtue of national citizenship. If the privilege be of that character, no state can abridge it.** No attempt has been made by the courts comprehensively to define or enumerate the privileges and immunities which the Fourteenth Amendment thus protects. **Among those privileges, however, undoubtedly is the right to pass freely from one state to another.** Crandall v. Nevada, 6 Wall. 35, 18 L. Ed. 745, supra; Williams v. Fears, 179 U.S. 270, 274, 45 L. Ed. 186, 188, 21 S. Ct. 128. **And that privilege, obviously, is as immune from abridgment by the state from which the citizen departs as it is from abridgement by the state which he seeks to enter.** This results from the essential character of national citizenship."

Thus, in the case at bar, according to Colgate v. Harvey, supra, the simple inquiry is this: Is the privilege

claimed by Joseph O'Neill one which arises in virtue of national citizenship, and if so, has that privilege been abridged by Section 942.02 Fla Statutes 1955? Counsel for Petitioner concedes both points, and, as Justice Sutherland said: "If the privilege be of that character, no state can abridge it."

Petitioner's argument does not take into consideration that the Act [Sec. 942.02 FS 1955] in question attempts to authorize the Interstate extradition of persons neither charged with nor suspected of having committed any crime. A reading of many cases from various jurisdictions, leads to the conclusion that if the States have any power to legislate at all on the subject of interstate extradition, their authority extends only to the enactment of laws in aid of the power conferred by Art. 4, Sec. 2 of the Constitution and the Acts of Congress passed to make said Constitutional power effective. Such laws as have been enacted deal with persons charged with crime, and hence are materially different in that respect from the Act [Sec. 942.02 FS 1955] here under consideration. For example, counsel refers to the Uniform Criminal Extradition Act [9 U.L.A. 258; Ch. 941 FS 1955] and Section 5 of the Uniform Reciprocal Enforcement of Support Act [9C U.L.A. 23; Sec. 88.061 FS 1957] both of which deal only with persons **charged with crime,** and are superfluous and unnecessary in view of the ample provisions of the Federal Statutes governing Interstate extradition of persons charged with treason, felony, or other crimes, and if such laws have any practical value whatever, it is only insofar as they aid or support the Federal Statutes.

Kentucky v. Dennison, 24 How. 66, 65 U.S. 717, does not decide or hold that the states possess any power, re-

served or otherwise, to seize and arrest a citizen of the United States not charged with treason, felony or other crime, and to forcibly deport him to another state as a prisoner: no such question was involved in that case. On the contrary, that case clearly decides that the right of one state to demand the rendition of a fugitive from justice, charged with the commission of treason, felony or other crime in the demanding state, and the obligation of the asylum State to honor that demand exists solely by virtue of **Art. 4, Sec. 2** of the Constitution:

> "The constitution having established the right on the one part and the obligation on the other, it became necessary to provide by law the mode of carrying it into execution. * * * * And, acting upon this authority, and the clause of the Constitution which is the subject of this controversy, Congress passed the Act of 1793, February 12th (1 Stat. at L. 302) which, as far as it relates to this subject, is in the following words: * * * *

The Court then quotes sections 1 and 2 of the Act of 1793 [Now: Title 18, Sec. 3182 U.S.C.A.]. In **UNITED STATES v. O'BRIEN, Sheriff,** (C.C.A. 7) **138 F. 2d 217,** the Court, which included Mr. Justice MINTON, then a Circuit Judge, said:

> "Unquestionably, the source of all authority for the extradition of an alleged fugitive from justice from one state to another is found in Art. IV, Sec. 2, clause 2 of the Constitution of the United States, which is not self-executing, but is made effective by Section 5278 of the Revised Statutes, 18 U.S.C.A. § 662 * * * * *"

We respectfully suggest, and submit, in the words of the Court in the case of **In RE ALLEN, 49 Pa. D. & C. 631, text, 643:**

> "The authority for extradition is found in the Federal Constitution and the Federal Statutes passed pursuant thereto. See R.S. par. 5278, 18 U.S.C. Par. 662. Roberts v. Reilly, 116 U.S. 80, 94 (1885), and Innes v. Tobin, 240 U.S. 127, 131 (1916). It would seem that if it required a provision of the Federal Constitution to provide for the compulsory transfer of a person charged with a crime from one state to another, a fortiori, an act for the compulsory transfer of an innocent person from one state to another for the purpose of giving viva voce testimony should have like express constitutional authority, * * * * * *"

A claim that State legislation has been enacted under the police power of the State cannot justify a disregard of constitutional inhibitions, as Mr. Justice McReynolds pointed out in **PANHANDLE EASTERN P. LINE v. STATE HIGHWAY COMM'N, 294 U.S. 613, 55 S. Ct. 563:**

> "A claim that action is being taken under the police power of the state cannot justify disregard of constitutional inhibitions. * * * * * The police power of a state, while not susceptible of definition with circumstantial precision, must be exercised within a limited ambit and is subordinate to constitutional limitations. * * * * Under it there is no unrestricted authority to accomplish whatever the public may presently desire."

In **EDWARDS v. CALIFORNIA**, supra, the State of California contended, with far better logical support than can be advanced in the case at bar, that the Act there under consideration had been enacted in the exercise of the State's police power, but that contention did not avail to sustain the Act, which this Court held unconstitutional.

The Act [Sec. 942.02 FS 1955]here under consideration had never been considered by the Court of last resort of any state, nor by this Court until the unanimous decision of the Supreme Court of Florida. **[App. of People of New York, etc. v. O'Neill, 100 So. 2d, 149]** here for review, and we respectfully submit that for the reasons stated by the learned Court below, and those we have advanced, the conclusion is irresistable that said Act is unconstitutional and the judgment under review should be affirmed.

The Provision Attempting to Authorize Issuance of Process Running Beyond State Boundaries Is Likewise Unconstitutional and Void.

The Act [Sec. 942.02 FS 1955] under consideration also attempts to provide for and authorize the issuance of a witness subpoen arunning beyond the boundaries of the state where issued, and this provision [Sec. 942.02, subsections (2) and (4) FS 1955] the lower Court also held unconstitutional;

> "Inasmuch as the circuit judge apparently could have put the witness under subpoena if he concluded against the "desirability" of placing him in custody and could have bound the witness to appear, or be held in contempt, and since the

judge held the whole act unconstitutional and discharged O'Neill, we decide, too, the question of the validity of the law as it would be applied in the other instance.

"It was the view of the circuit judge that the courts of this state were without power to issue process effective beyond the borders of the state. This general rule we understand is true. Passett v. Chase, 91 Fla. 552, 107 So. 689. Nor can civil process operate beyond the limits of the state so as to form a basis for a money judgment against one residing without although he has been made a party to the litigation by constructive service. Pennoyer v. Neff, 95 U.S. 714, 24 L. Ed. 565.

* * * *

"We ask the rhetorical question: How, then can a Florida court enforce an order to appear before a court of another state when the operation of the order clearly extends beyond state limits? While any person is within the boundaries of this state he is subject to orders entered against him by court properly exercising their jurisdiction, but it would be inconsistent with the decisions cited to hold that such a court could command a witness to appear in New York, send him on his way, then, if the witness did not appear in New York, punish him here for his failure there "in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state." It is not clear just what could would administer the punishment in the event of default because that part of the act provides that "he shall be punished" in the manner described. Con-

ceivably his failure would be contemptuous of both courts. If the Florida court attempted to inflict punishment, it would be for failure to comply in New York; if the New York court undertook to inflict punishment, it would be for failure to obey a summons set in motion in Florida. Either way the Florida process would be operating extra-territorially."

Petitioner's counsel seem to abandon any attempt to sustain the constitutionality of this aspect of said Act. [See: Petitioner's Brief, pp. 26-27]. We have already discussed this feature of said Act [**See: pp. 44-55 of this Brief**] and, without repeating our argument, we respectfully refer the Court thereto. We particularly rely upon **Pennoyer v. Neff, 95 U.S. 714; Kirkes v. Askew, 32 F. Supp. 802;** and **McLean v. Mississippi (CCA-5) 96 F. 2d. 741, 119 A.L.R. 670,** cert. den. **305 U.S. 623, 59 S.Ct. 84, 83 L. Ed. 399.** We respectfully submit that the unconstitutionality of this feature of said Act is not debatable.

CONCLUSION

It is conceded that one of the privileges and immunities of Joseph C. O'Neill by virtue of being a citizen of the United States is the right to pass freely from State to State. It was settled in COLGATE v. HARVEY, supra, that the Fourteenth Amendment requires, not merely "equality of privileges; but it demands that the privileges of all citizens shall be absolutely unabridged, unimpaired," and the right to pass freely from state to state being a privilege of national citizenship "no State can abridge it." As the Supreme Court of Florida said:

"A Citizen of Illinois, comes to Florida for a brief visit; he is haled into court and confronted with an order placing him in custody of an officer who will conduct him to New York. His privilege of staying or returning to his home in Illinois, or of going elsewhere, is brought to an end. It is difficult to imagine a harsher infringement of the right a citizen has to go from place to place which is a privilege, according to the expressions of the Supreme Court of the United States, secured to him under the Fourteenth Amendment."

Application of PEOPLE OF NEW YORK v. O'NEILL (Fla) 101 So. 2d. 149, Text 155.

We respectfully submit that the Act [Sec. 942.02 F.S. 1955] in question is clearly unconstitutional and void, because:

FIRST: It abridges the privilege of citizens of the United States, existing by virtue of the Fourteenth Amendment, to pass freely from state to state.

SECOND: The power of Inter-state rendition emanates solely from the power delegated to the Federal Government by **Art. 4, Sec. 2** of the Constitution, which authorizes interstate rendition of persons charged with "treason, felony, or other crimes", and does not authorize the seizure and arrest and deportation of citizens not charged with crimes against any state, and absent such authority conferred by the Constitution of the United States, no such power exists on the part of the States.

THIRD: The Act [Sec. 942.02 FS 1955] making no provision for bail, and lacking any requirement that facts be stated to support the application, for seizure and arrest, same deprives citizens of their liberty without due process of law in contravention of the Fourteenth Amendment.

FOURTH: Sub-Sections (2) and (4) of Sec. 942.02 FS 1955, are unconstitutional and void insofar as same attempt to authorize issuance of process, a witness subpoena, running beyond the boundaries of a state.

We therefore respectfully submit that the opinion (R: 35-47) and judgment (R: 47) of the Supreme Court of Florida here under review should be affirmed.

L. J. CUSHMAN
Counsel for Respondent
JOSEPH C. O'NEILL.

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that on the_____day of October, 1958, I mailed a printed copy of the foregoing Brief of Respondent to the following: **Hon. Richard W. Ervin, Attorney General of Florida,** The Capitol, Tallahassee, Florida; **Hon. Reeves Bowen, Assistant Attorney General of Florida,** The Capitol, Tallahassee, Florida; **Hon. Frank S. Hogan, District Attornep, New York County,** New York 13, New York; **Hon. John Anderson, Jr., Attorney General of Kansas,** and **The National Conference of Commissioners on Uniform State Laws,** by mailing same to **Hon. James C. Dezendorf, as President,** Pacific Building, Portland 4, Oregon, and **Hon. Louis A. Kohn, as Counsel,** 231 South La Salle Street, Chicago 4, Illinois.

Dated at Miami, Florida, this_____ day of October, 1958.

L. J. CUSHMAN
Counsel.

In re O'NEILL.

9 Fla. Supp. 153

Circuit Court, Dade County.

July 20, 1956.

Under provisions of a "uniform law" for Interstate Extradition of Witnesses, chapter 942, Florida Statutes 1955, the state of New York filed an application for an order requiring O'Neill to attend and testify before a grand jury in that state, reciting that he was a "material and necessary" witness in a criminal proceeding and requesting that he be taken in custody and delivered to a New York officer to assure his attendance.

The circuit court, Holt, J., issued an attachment for him and a rule directing him to show cause why he should not be taken in custody, he was arrested, taken before the court, released on bail, filed a response to the rule and a motion to quash.

After a hearing, holding provisions of section 942.02[1]

[1] 942.02 *Summoning witness in this state to testify in another state.*—

(1) If a judge of a court of record in any state which by its laws has made provision for commanding persons within that state to attend and testify in this state certifies under the seal of such court that there is a criminal prosecution pending in such court, or that a grand jury investigation has commenced or is about to commence, that a person being within this state is a material witness in such prosecution, or grand jury investigation, and that his presence will be required for a specified number of days, upon presentation of such certificate to any judge of a court of record in the county in which such person is, such judge shall fix a time and place for a hearing, and shall make an order directing the witness to appear at a time and place certain for the hearing. The witness shall at all times be entitled to counsel.

unconstitutional and otherwise invalid, the court granted the motion, denied the application, dismissed the proceeding with prejudice, discharged him from custody, canceled his bond.

O'Neill, an Illinois citizen who came to Florida to attend a convention, was not charged with violating any law of any state, was not a fugitive from justice subject to extradition under the Uniform Extradition Law or the Federal Criminal Extradition Statute.

Section 942.02 contravened the clause in the 14th

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(2) If at a hearing the judge determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in the prosecution or a grand jury investigation in the other state, and that the laws of the state in which the prosecution is pending, or grand jury investigation has commenced or is about to commence (and of any other state through which the witness may be required to pass by ordinary course of travel), will give to him protection from arrest and the service of civil and criminal process, he shall issue a summons, with a copy of the certificate attached, directing the witness to attend and testify in the court where the prosecution is pending, or where a grand jury investigation has commenced or is about to commence at a time and place specified in the summons. In any such hearing the certificate shall be prima facie evidence of all the facts stated therein.

(3) If said certificate recommends that the witness be taken into immediate custody and delivered to an officer of the requesting state to assure his attendance in the requesting state, such judge may, in lieu of notification of the hearing, direct that such witness be forthwith brought before him for said hearing; and the judge at the hearing being satisfied of the desirability of such custody and delivery, for which determination the certificate shall be prima facie proof of such desirability may, in lieu of issuing subpoena or summons, order that said witness be forthwith taken into custody and delivered to an officer of the requesting state.

(4) If the witness, who is summoned as above provided, after being paid or tendered by some properly authorized person the sum of ten cents a mile for each mile by the ordinarily traveled route to and from the court where the prosecution is pending and five dollars for each day, that he is required to travel and attend as a witness, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state.

amendment to the federal constitution which provides that no state shall deprive any person of life, liberty or property without due process of law.

Subsection (3) of section 942.02 made no provision for bail, authorized any court of record to order a citizen arrested, held and delivered without bail to an officer of the requesting state to be taken as a prisoner to another state. In Florida a fugitive from justice or a person charged with crime is entitled to bail except in capital cases where the proof of guilt is evident or the presumption great, it is not due process of law to protect the liberty of fugitives from justice or criminals to a greater degree than the liberty of persons not charged with crime.

Section 942.02, by impairing the right of free ingress and egress from state to state, contravened the clause in the 14th amendment to the federal constitution which forbids any state to make or enforce any law which abridges the privileges or immunities of citizens of the United States.

Section 942.02 contravened guaranties in the state and federal constitutions that the people shall be secure in their persons from unreasonable searches and seizures.

The courts of Florida have no jurisdiction to issue process running beyond the territorial limits of the state. A court created within a sovereignty is limited in its sphere of direct action to persons and things within that sovereignty.

Neither the affidavit nor the certificate upon which the application was based, filed under provisions of sub-

section (2) of section 942.02, set forth any facts from which it was made to appear that O'Neill was a "material and necessary" witness, absent such a showing the court could not in any case issue a summons or subpoena, the mere statement of a conclusion that he was a material and necessary witness was insufficient. Section 22 of the declaration of rights of the Florida constitution guarantees the right of the people to be secure in their persons, houses, papers and effects, and that no warrants shall issue "but upon probable cause, supported by oath or affirmation."

The applicant filed notice of appeal to the Supreme Court on August 15, 1956.

Frank S. Hogan, District Attorney, Francis X. Clark, Assistant District Attorney, both of New York City, for the State of New York.

L. J. Cushman, Miami, and S. G. Lippman, Washington, D. C., for respondent.

GEORGE E. HOLT, Circuit Judge.

This is an application by the People of the State of New York for an order requiring Joseph C. O'Neill to attend and testify before the grand jury of New York County, New York, pursuant to provisions of chapter 942, Florida Statutes 1955, the "Uniform Law to Secure the Attendance of Witnesses from within or without a State in Criminal Proceedings," which, for the sake of brevity, will hereafter be referred to as the "uniform law"—which was adopted in this state in 1941.

On April 23, 1956 an assistant district attorney in and for New York County, New York, filed in this cause a certificate of a judge of the court of general sessions of the county of New York, supported by an affidavit of an assistant district attorney of that county, certifying that there was then pending in that court a criminal investigation by the Fourth November 1953 grand jury of that county entitled "The People of the State of New York v. John Doe," and that a certain Joseph C. O'Neill, then within Dade County, Florida, was a necessary and material witness for the state of New York in a criminal proceeding being conducted by the grand jury, and requesting that he be taken into immediate custody and delivered to an officer of the state of New York to be conveyed to New York in order to assure his attendance as a witness before the grand jury. Upon presentation of the certificate, this court issued an attachment for O'Neill, and a rule directing him to show cause why an order should not issue to take him into immediate custody and deliver him to an officer of the state of New York to assure his attendance in New York.

O'Neill was forthwith seized and arrested on the attachment and rule to show cause, and brought before this court in custody. Through his attorney he requested time to review the matter upon which the attachment and rule to show cause was based, and to file a response to the rule to show cause. This court fixed bail at $2,500 and allowed him time within which to file his response to the rule to show cause. Thereafter, O'Neill filed his response to the rule and a motion to quash, and this cause came on to be heard on June 18, 1956, on the certificate of the judge of the court of general sessions of New York County, New York, the rule to show cause issued thereon, the response,

and the motion to quash filed by and on behalf of O'Neill, who appeared in person and by counsel, the applicant being represented by Hon. Francis X. Clark, an assistant district attorney in and for the county of New York, assigned to the rackets bureau of the district attorney's office.

By his response to the rule to show cause O'Neill objected to the entry of any order that he be taken into immediate custody, or that he be delivered to an officer of the state of New York, on the ground that the "uniform law" was unconstitutional and void, in that same was in contravention of certain provisions of the constitution of the United States, and the constitution of Florida, and that no sufficient showing had been made that he was or is a necessary and material witness in said criminal proceeding, and other reasons, which will be noted hereinafter. The matter was fully argued by counsel for the respective parties, and the argument was reported, transcribed, and submitted to the court, together with briefs by counsel for the respective parties, all of which have been fully considered by the court.

The "uniform law," first adopted by the National Conference of Commissioners on Uniform State Laws, in 1931, (see note, 24 F.S.A. 288), in point of fact is "uniform" in name only, and in its general over-all outline, because almost every state which has adopted it, has made changes in its text. Although 25 years have elapsed since it was first proposed for adoption by the states and although it has been adopted in somewhat different form by 42 states and the territory of Puerto Rico (see 9 U.L.A. Supp. 33), there appear to be only eleven reported decisions, listed in the appendix to this opinion, in which it

has been considered, construed, or passed upon in any way.

The "uniform law" appears to provide for two methods by which a witness may be compelled to appear and testify as a witness in another state. **First,** by the issuance of a "summons *** directing the witness to attend and testify in the court" of the other state, as provided in subsection (2) of section 942.02; in other words, by the issuance of a witness subpoena by a court of record of this state, directed to the witness, requiring him to go to another state, and appear and testify in the court of such other state. **Second,** by the issuance or entry of an order, provided by subsection (3) of section 942.02, that the witness be taken into immediate custody and delivered to an officer of the requesting state to be taken as a prisoner to the state where his attendance is desired as a witness. The certificate which is the basis for this application seeks to invoke the second method—that is, it recommends the immediate seizure of O'Neill, and his immediate delivery to officers of the state of New York.

The briefs filed by counsel for the applicant and counsel for the respondent have not cited a single reported case in which any court has considered or passed upon the constitutionality of the particular subsection of the "uniform law" (subsection (3) of section 942.02) except In re Allen (1940), 49 Pa. D. & C. 631, in which the court, after fully considering the constitutionality of the Act, held it unconstitutional, and expressly held (text 642-644) that the section attempting to provide for the immediate seizure of the witness and his immediate delivery to officers of the requesting state, is unconstitutional. The only other reported decision which refers to that particular

subsection of the Act is U. S. v. Monjar (C.C.A. 3, 1946), 154 F. 2d 954, 170 A.L.R. 327, in which the court merely refers to said subsection, and holds that it should not be invoked against the clerk of the United States district court for the district of Delaware.

There appear to be only three reported decisions which have considered the constitutionality of the "uniform law"—two in New Jersey, and one in Pennsylvania. In re Allen, supra, decided in 1940, is the earliest of the three decisions, and in a well considered, well supported decision, the court held the Act unconstitutional because—(1) It violates the fourteenth amendment to the Constitution of the United States, which forbids any state to make or enforce any law which abridges the privileges and immunities of citizens of the United States; (2) It violates the clause in the fourteenth amendment to the Constitution of the United States which provides that no state shall deprive any person of life, liberty, or property, without due process of law; and (3) It violates the constitutional guaranty that the people shall be secure in their persons from unreasonable searches and seizures. In re Cooper, 127 N.J.L. 312, 22 A. 2d, 532, decided in 1941, is the next case in which the constitutionality of the Act was considered, but the question does not appear to have been fully presented; nor does it appear to have been fully considered or decided, and in that case, the provision authorizing the immediate seizure of the witness, and his immediate delivery to the officers of the requesting state (subsection (3) of section 942.02) was not involved or considered. The third case, In re Saperstein, 30 N.J. Super. 373, 104 A. 2d 842, cert. den. 75 S. Ct. 110, 348 U.S. 874, 99 L. Ed. 688, decided in 1954, primarily dealt with the question whether the "summons" or subpoena provided for by

the Act (subsection (2), section 942.02) authorized a subpoena duces tecum, and the provision relied upon in the case before the court, subsection (3), was not involved. The only point considered, so far as constitutionality of the Act was concerned, was whether it constituted a "compact" between states, in violation of the third clause of section 10, article I, of the Constitution of the United States, and the court held that it did not constitute such a "compact." Thus, in the only three cases in which the constitutionality of the "uniform law" has been considered, it has been held unconstitutional in one, and in the other two, its constitutionality does not appear to have been carefully or thoroughly argued, considered, or decided, but, in the only case (In re Allen, supra) in which the constitutionality of subsection (3) of section 942.04 has been considered, it was held unconstitutional. In view of the fact that the constitutionality of the "uniform law" has been considered in only three cases during the 25 years which have passed since it was first proposed, and by the courts of only two of the 42 states which have enacted the law (Pennsylvania and New Jersey), it can hardly be said that its constitutionality is settled.

Two other cases have been cited, bearing upon the constitutionality of the Act under consideration—In re Commonwealth of Pennsylvania, (Sup. Ct.), 90 N.Y.S. 808, decided in 1904, and Commonwealth of Massachusetts v. Klaus, 145 App. Div. 798, 130 N.Y.S. 713, decided in 1911. The "uniform law" was adopted by the National Commissioners on Uniform State Laws in 1931, 20 years after the decision in the Klaus case, and 27 years after the decision of the case in 90 N.Y.S. 808, both of which involved section 618-a of the New York Code of Criminal Procedure, undoubtedly a forerunner of the "uniform law," but which

did not contain any provision similar to sub-section (3) of sec. 942.02. It is also worthy of note that neither of those cases was decided by the highest court of the state of New York, and in the first (In re Commonwealth of Pennsylvania) the court held the Act to be unconstitutional, while in the second (Commonwealth v. Klaus) the Act was held constitutional by a divided court, with a well-considered, vigorous dissent. In conclusion, it may be said that the constitutionality of the "uniform law" is not settled, but appears to be in grave doubt.

In considering this case, it must be borne in mind that O'Neill is not under indictment in the state of New York, and it is not contended that he is a fugitive from justice so as to make him subject to extradition pursuant to the Uniform Interstate Extradition Law, sections 941.01 to 941.37, Florida Statutes 1955, or under the Federal Criminal Extradition Statute (sections 3181 to 3195, Title 18 U.S.C.A.) expressly authorized by section 2 of article IV of the Constitution of the United States. It appears without question in this case that O'Neill is a citizen of Illinois, and that he resides, and has his home, and office or place of business in that state. He came into the state of Florida on or about April 23, 1956 for a few days' sojourn in connection with a convention which he was attending. He is not charged with having violated any law of the state of New York, or the state of Florida, or any other state.

It is settled beyond controversy or debate that the courts of Florida have no jurisdiction to issue process running beyond the territorial limits of this state, and have no jurisdiction over persons, or property beyond the territorial limits of the state of Florida. "A court created

within a sovereignty is necessarily limited as to its sphere of direct action on persons and things, real estate and chattels within that sovereignty." Hotchkiss v. Martin (Fla.), 52 So. 2d. 113. Process of one state has no force or validity within the territorial limits of another state, and cannot run beyond the territorial limits of the state. Passett v. Chase, 91 Fla. 522, 107 So. 689. A court created within and for a particular territory is limited in its jurisdiction to such territory, and no judicial process has any force outside such limits. Phillips v. State, 75 Fla. 93, 77 So. 665. "A warrant of arrest issued in one state may not be executed in another state, for it has no validity beyond the boundaries of the state by whose authority it was issued." 3 Fla. Jur., Arrest, p. 55. It has been settled ever since Pennoyer v. Neff, 95 U.S. 714, 24 L. Ed. 565, that the legislature of a state cannot authorize process running beyond the territorial limits of the state. Under the authorities cited, it is clear that the legislature of this state has no constitutional power to confer jurisdiction upon the courts of this state to issue process running beyond the territorial limits of the state of Florida, and that is the effect of subsection 1 of section 942.02. Just as the legislature of this state is powerless to confer jurisdiction upon this court to issue witness subpoenae or other process running into Georgia, Alabama, or any neighboring state, it is likewise powerless to confer jurisdiction upon this court to issue witness subpoenae or other process running into other states, such as New York. If a witness subpoena were issued by this court commanding a witness to appear before a court of the state of New York, such process would be of no force and effect as compulsory process. Insofar as subsection 1 of section 942.02 attempts to confer any such power, authority, or jurisdiction upon any court of record of this state, it is unconstitutional,

void, and of no effect. Passing for the moment, the fact that the legislature of this state is powerless to confer upon this or any other court of the state of Florida jurisdiction to issue process running beyond the limits of the state, section 942.02 also violates the fourteenth amendment to the Constitution of the United States in that it abridges the privileges and immunities of citizens of the several states, since it impairs the right of free ingress and egress from state to state, which is one of the rights of national citizenship guaranteed by the fourteenth amendment to the Constitution of the United States. Edwards v. California, 314 U.S. 160, 62 S. Ct. 164, 86 L. Ed. 119; In re Allen, supra; Commonwealth v. Klaus, supra; and Commonwealth v. Pennsylvania, supra.

Perhaps the most serious objection to the constitutionality of the "uniform law" (sections 942.01 to 942.04) is found in the provisions of subsection (3) of section 942.02, which attempts to authorize a court of this state to order a citizen not charged with the commission of any crime, or even suspected of having committed any crime, to "be taken into immediate custody and delivered to an officer of the requesting state," or, "in lieu of issuing subpoena or summons, order that such witness be forthwith taken into custody and delivered to an officer of the requesting state." This subsection makes no provision for bail, and if followed literally, does not contemplate or permit bail, but attempts to authorize any court of record to order a citizen to be arrested, seized and held without bail, and to be delivered, without bail, to an officer of the requesting state to be carried away against his will as a prisoner to another state. Neither counsel has cited any reported case holding this subsection of the Act under consideration constitutional. This section was merely

mentioned in passing in U.S. Monjar (C.C.A.3), 154 F. 2d 954, 170 A.L.R. 327, with the observation that should a subpoena be issued to the clerk of the United States court for the district of Delaware, he should not be subjected to the provisions of that section. In the case of In re Allen, supra, the court held that the failure of this section to provide for bail rendered the Act unconstitutional. In discussing this subject the court said at page 643—

> The Statute under consideration with its provisions for taking a witness into custody and delivering him bodily over to the authorities from a foreign jurisdiction is, in our opinion, clearly unreasonable and unwarranted. A person charged with a crime can be taken from one State to another in order that he may be punished for the crime. It is significant that the clause in the Federal Constitution which reads as follows: "A person charged in any State with Treason, Felony, or other crime, who shall flee from Justice, and be found in another State, shall on Demand of the Executive Authority of the State from which he fled, be delivered up to be removed to the State having Jurisdiction of the Crime"; is part of Section 2 of Article IV of the Federal Constitution, and it immediately follows and thus qualifies the opening sentence of that section which guarantees to the citizens of each State all the privileges and immunities of citizens in the several States.
>
> The authority for extradition is found in the Federal Constitution and the Federal Statutes passed pursuant thereto. See R.S. par. 5278, 18 U.S.C. par. 662. Roberts v. Reilly, 116 U.S. 80, 94 (1885), and Innes v. Tobin, 240 U.S. 127, 131 (1916). It would seem that if it required a provision of the Federal Constitution to provide for the compulsory transfer of a person charged with a crime from one State to another, a fortiori, an Act for the compulsory transfer of an innocent person from one State to another for the purpose of giving viva voce testimony should have like express constitutional authority, and that the Act should permit the proposed witness to enter his recognizance as in extradition proceedings. A fugitive from justice or a person in this State charged with a crime in another State is allowed to enter bail unless the crime with which he is charged is punishable by death or life imprisonment; Act of April 2, 1927, P.L. 327, Sec. 16. Surely, it is not due process of law to protect the liberty of criminals and fugitives from justice to a greater degree than the liberty of honest and law-abiding citizens of this State.

The right to bail in Florida is not a mere "privilege," which may be denied in the court's discretion. The right to bail is absolute, unless the person is charged with a capital offense, and even then, he is entitled to bail unless

the proof of guilt is evident or the presumption great. Ex parte McDaniel, 86 Fla. 145, 97 So. 317; Bozovichar v. State (Ind.), 103 N.E. 2d 680; Section 9, Declaration of Rights of the Constitution of Florida. The right to bail under the Constitution of the United States, and other states is almost universal and unrestricted, except in capital cases where the proof of the prisoner's guilt is evident or the presumption of his guilt is great. See: Section 5, Bill of Rights of the constitution of New York; Eighth Amendment to the Constitution of the United States. "A denial of such right is a deprivation of liberty without due process of law." 3 Fla. Jur., Bail and Recognizance, pp. 37-38.

Subsection 3 of section 942.02, invoked by the applicant in this case, is clearly unconstitutional and void, and the application for an order to take Joseph O'Neill into immediate custody must be and is hereby denied.

Subsection 2 of section 942.02 requires that this court determine that the witness is "material and necessary." Neither the certificate, nor the affidavit upon which it is based, set forth any facts from which this court can determine that O'Neill is a "material and necessary" witness before the grand jury, and the showing made in that respect is no stronger than the showing made in the Application of Stamler (N.Y. 1952), 279 App. Div. 908, 111 N.Y.S. 2d 313, in which the state of New Jersey sought a subpoena order to require Frank Costello to appear and testify as a witness in a criminal proceeding in that state. In that case, the court said—

> Section 618-a of the New York Code of Criminal Procedure contemplates, at the very least, that the Court of the demanding State shall have passed on the question whether the tes-

timony will be material in the prosecution pending in that State. Whether a mere statement that the witness is a material witness would be sufficient without further recital of the charge and the facts upon which the finding of materiality was based, we do not need now to pass upon. At least upon the certificate produced in this case it was improper for the Judge of the Court of General Sessions to grant the subpoena-order without any proof of the materiality of the testimony of the Order.

In State v. Blount (Ore. 1954), 264 P. 2d 419, cert. den. 74 S. Ct. 711, 347 U.S. 962, 98 L. Ed. 1105, the Oregon court held that the showing of the facts required by the "uniform law" to show that the witness is "material and necessary," should at least be as great as the showing required in order to obtain a continuance upon the ground of the absence of a material witness, and that it must appear from a statement of the facts that such witness is "material and necessary," and that a mere statement to that effect is insufficient. In State v. Fouquette (Nev. 1950), 221 P. 2d, 404, cert. den. 71 S. Ct. 799, 341 U.S. 932, 95 L. Ed. 1361; 72 S. Ct. 369, 342 U.S. 928, 96 L. Ed. 691, the court again held that under the Act in question the facts must be stated to show that such a witness is both material and necessary. It is well settled in Florida that in order to secure a continuance upon the ground of the absence of a material witness, the applicant must state the facts to which such witness would testify, in order that the court may determine from the facts that the testimony of the absent witness is material and necessary. Harrell v. Durrance, 9 Fla. 490; Reynolds v. Smith, 49 Fla. 217, 38 So. 903. Tested by this rule, the certificate and the affidavit upon which this application is based fall far short of any showing that O'Neill is a "material and necessary witness" in any proceeding pending in New York. It is a safe rule that in any proceeding in which an application for the seizure of any person is sought, the application should state the facts upon which such application is based

Section 22 of the declaration of rights of the constitution of Florida guarantees the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and that no warrants shall be issued but upon probable cause supported by oath and affirmation. Warrants for the arrest of any person can only be issued in this state upon oath indicating a probable violation of the law. Section 901.02, Florida Statutes, 1955, 3 Fla. Jur., Arrest, pp. 48-49; Conrad v. Van Buren, Cir. Judge, 144 Mich. 492, 108 N.W. 347. Neither the affidavit, nor the certificate upon which this application is based set forth any facts from which it is made to appear that O'Neill is a "material and necessary witness," and in the absence of such a showing, this court is not authorized to issue any summons, or subpoena, and the mere statement of a conclusion that he is a material or necessary witness is insufficient. Application of Stamler, supra; State v. Blount, supra; State v. Fouquette, supra.

Upon consideration thereof, the court is of the opinion that the application of the People of the State of New York should be denied, and this proceeding dismissed. It is therefore considered, ordered and adjudged as follows—

That O'Neill's motion to quash and discharge the rule to show cause issued herein and directed to him is granted, the rule to show cause is quashed and discharged, and he is discharged from custody thereunder.

That O'Neill and the surety on his bond posted pursuant to the rule to show cause be, and they and each of them, are discharged of all liability thereunder.

That the attachment issued in this cause for the ar-

rest of Joseph O'Neill described therein as Joseph C. O'Neill, is quashed and dismissed.

That the application of the People of the State of New York for an order requiring Joseph O'Neill to attend and testify before the grand jury of New York County, New York, is denied, and this proceeding dismissed, with prejudice and at the cost of the applicant.

APPENDIX

(1) **People v. Parker** (Cir. Ct. N.J. 1936), 16 N.J. Misc. 471, 1 A. 2d 54. (2) **In re Cooper** (N.J. 1941), 127 N.J.L. 312, 22 A. 2d 532. (3) **In re Saperstein** (Superior Ct. App. Div. N.J. 1954), 30 N.J. Super. 373, 104 A. 2d 842, cert. den. 348 U.S. 874, 75 S. Ct. 110, 99 L. Ed. 688. (4) **U.S. v. Monjar** (C.C. A. 3. 1946), 154 F. 2d 954. (5) **Application of Stamler** (N.Y. 1952), 279 App. Div. 908, 111 N.Y. S. 2d 313. (6) **State v. Blount** (Ore. 1954), 200 Ore. 35, 264 P.2d 419, cert. den. 347 U.S. 962, 74 S. Ct. 711, 98 L. Ed. 1105. (7) **State v. Fouquette** (Nev. 1950), 67 Nev. 505, 221 P. 2d 404, cert. den. 341 U.S. 932, 71 S. Ct. 799, 95 L. Ed. 1361; 342 U.S. 928, 72 S. Ct. 369, 98 L. Ed. 691. (8) **Vore v. State** (Neb. 1954), 158 Neb. 222, 63 N.W. 2d 141. (9) **People v. Simon** (Cal. Dist. Ct. of App. 1951), 107 Cal. App. 2d 105, 236 P. 2d 855, cert. den. 343 U.S. 911, 72 S. Ct. 645, 96 L. Ed. 1327. (10) **State ex rel Butler v. Swenson** (Minn. 1954), 66 N.W. 2d 1. (11) **In re Allen** (1940), 49 Pa. D. & C. 631.

APPENDIX B

Application of the PEOPLE OF the STATE OF NEW YORK for an Order Requiring Joseph C. O'NEILL to Attend and Testify Before the Grand Jury of the County of New York, State of New York.

Supreme Court of Florida.

Jan. 22, 1958.

Rehearing Denied Feb. 24, 1958.

100 So. 2d 149

Proceeding respecting interstate extradition of witness wherein certificate of judge of New York court was filed recommending that named person, an Illinois resident visiting in Florida, should be taken into custody and delivered to New York officer to assure his personal attendance as witness in New York grand jury investigation. The Circuit Court, Dade County, George E. Holt, J., entered judgment holding statute unconstitutional and State appealed. The Supreme Court, Thomas, J., held that statute authorizing state of Florida to take nonresident citizen visiting state into custody and compel his appearance as a witness before court in another state is unconstitutional as violation of Fourteenth Amendment of Federal Constitution.

Affirmed.

Richard W. Ervin, Atty. Gen., Reeves Bowen, Asst. Atty. Gen., and Frank S. Hogan, Dist. Atty., New York County, New York City, for appellant.

L. J. Cushman, Miami, for appellee.

THOMAS, Justice.

On 23 April 1956 there was filed in the Circuit Court of Dade County, Florida, the certificate of Honorable Mitchell D. Schweitzer, Judge of the Court of General Sessions of the State of New York, reciting that he had read an affidavit signed by an Assistant District Attorney of the County of New York, recommending that one Joseph C. O'Neill be taken into custody and delivered to an officer of the State of New York to assure his attendance there and that the witness, O'Neill, be brought immediately before the Florida court for hearing on the matter of extradition.

It was stated in the certificate that the District Attorney had been conducting before a grand jury an investigation of the use of funds of certain labor unions and the activities of union officials in the handling of such monies. The grand jury was undertaking to determine whether or not union officials and representatives had conspired to steal funds belonging to the unions in violation of Secs. 580 and 1290 of the Penal Law of New York, McKinney's Consol.Laws, c. 40.

In the certificate O'Neill was designated a material and necessary witness in the investigation. He was described as General President of the Distillery, Rectifying, Wine and Allied Workers' International Union of

America, Chairman of the Executive Board, and Chairman of the Social Security Department which administers the welfare fund of the union. The grand jury purposed to learn from him about disposition of the union's funds.

According to the judge's certificate efforts to procure the attendance of O'Neill had been unsuccessful and he had refused to appear voluntarily and testify. Inasmuch as he resided in Illinois, in which no reciprocal witness statute has been enacted, the office of the District Attorney could not compel his presence.

Continuing, it was stated that the District Attorney learned that a convention of the union would be held in Miami 23 April 1956 and that under the constitution of the union the president, O'Neill, was required to be present and preside.

By the certificate O'Neill was assured of protection from arrest or service of civil and criminal process in connection with matters arising before his entrance into New York should he appear under court order.

We see no occasion to give a summary of the statements in the affidavit of the Assistant District Attorney as they seem harmonious with the ones appearing in the judge's certificate which contains sufficient information for determination of the points in controversy.

There was incorporated in the affidavit the request that the court under Sec. 618-a of the New York Code of Criminal Procedure issue the certificate we have described.

Upon the filing of the certificate in the Circuit Court of Dade County the judge ordered the sheriff to attach O'Neill and bring him forthwith before the court to show cause why an order should not immediately issue for his custody and his delivery to an officer of the State of New York. Evidently the same day the certificate was filed O'Neill was apprehended and gave bond, although there is no provision in our statute, Sec. 942.02, Florida Statutes 1955, F.S.A., for such a bond.

A month later O'Neill filed a response and after another month had passed a hearing was held by the circuit judge when arguments of Assistant District Attorneys from New York and O'Neill's counsel were presented but at which no testimony was taken. Subsequently the judge, basing his opinion on the record, concluded that Sec. 942.02, supra, was unconstitutional because by it the state was given extraterritorial jurisdiction, the right of ingress and egress across the state line was impaired and the witness could be taken into custody here and delivered into custody of an officer of another state without bail. Also, the judge thought the certificate of the Judge of the Court of General Sessions of New York and the affidavit of the Assistant District Attorney did not depict a situation showing that O'Neill was a material and necessary witness.

We dismiss the last point with the observation that it is plain to us O'Neill is a material and necessary witness in the investigation of the misuse of funds of the union. By the terms of the act, the certificate of the judge must be taken as "prima facie evidence of all the facts stated therein." It may be logically deduced that because of the positions held by O'Neill he is familiar

with the funds of the organization if, indeed, he does not supervise or control them, and we think that in an investigation of the administration of those funds he would prove a material and necessary witness.

It is stated in the brief of the Attorney General that the "appellant" filed a notice of appeal and filed "its" assignments of error and "its" directions to the clerk.

Upon an examination of the record, we find that the notice of appeal was filed by "The Applicant, the People of the State of New York" and that it, the assignments of error and the directions to the clerk, carried the names of the District Attorney of New York County, the Attorney General of Florida, the State Attorney of the Eleventh Judicial Circuit and an Assistant State Attorney but were signed only by the Assistant State Attorney. On the notice of appeal these officers were described as attorneys for "applicant" and on the assignments of error and directions to the clerk, as attorneys for "appellant".

Soon after the appeal was lodged here the attorney for Joseph C. O'Neill moved to dismiss it, and the members of the court sitting at the time deferred a ruling until hearing of the cause on the merits.

We have now reconsidered the motion and have concluded we should proceed to a determination of the dispute on the merits, that is, the adjudication of the validity of Sec. 942.02, supra. The motion was based on the ground that this court had no jurisdiction because the order attempted to be reviewed was entered in a criminal proceeding and the state had no right to appeal except

from orders specified in Sec. 924.07, Florida Statutes 1955, F.S.A., of which the order of the circuit judge was not one, and further that the People of the State of New York had no right of appeal. The Attorney General countered on the ground that the case was a civil proceeding and asked this court to consider the appeal a petition for certiorari, under Sec. 59.45, Florida Statutes 1955, F.S.A., if it appeared that the appeal had been improvidently taken.

[1] We agree with the Attorney General that the proceeding is not criminal and that appeal was the proper method of review as, by Sec. 5 of Art. V of the Constitution, F.S.A., this court had "appellate jurisdiction in all cases at law * * * originating in Circuit Courts * * *." The case originated in the circuit court and the appeal was filed before the effective date of the amendment of Art. V adopted in November 1956.

[2] The procedure followed by the Attorney General is rather unusual because the record does not show any participation by him until the circuit judge had ruled. His name first appears on the notice of appeal. But the State of New York, in our opinion, had the right to appeal as O'Neill would have had if the judgment had been unfavorable to him. The appeal became effective when the notice was filed by the District Attorney of New York County. The introduction of the Attorney General into the controversy was somewhat unorthodox but in view of the mandate in Sec. 22 of Art. IV of the Constitution that he "perform such other legal duties as may be prescribed by law" and the requirement of Sec. 16.01, Florida Statutes 1955, F.S.A., that he "appear in and attend to in behalf of the state, all suits or prosecutions,

civil or criminal, or in equity, in which the state may be a party, or in any wise interested * * *" we will consider his entrance via the notice of appeal an effort to present the interest of the state in the preservation of the statute. This concern of the state in maintaining the validity of the law comes from the law's reciprocal nature. If the act is held unconstitutional, then, of course, the attendance here of witnesses residing in states having such a uniform act cannot be accomplished.

The act is known as the "'uniform law to secure the attendance of witnesses from within or without a state in criminal proceedings.'" Sec. 942.06, Florida Statutes 1955, and F.S.A., and is "only applicable to such state as shall enact reciprocal powers to this state relative to the matter of securing attendance of witnesses" as provided in it. Sec. 942.05, Florida Statutes 1955, F.S.A. It was enacted in New York, Code of Criminal Procedure 618-a, supra.

We return now to the procedure outlined. If it is recommended in the certificate that the witness be taken into immediate custody and delivered to an officer of the state making the request, the judge may, instead of notification of the hearing, order the witness brought before him at once. Such a recommendation was made in this case and such an order was initially entered. It is provided in the act that if at the hearing the custody and delivery appear to the resident judge 'desirable', he may order the witness placed in custody and delivered to an officer of the state making the request.

Evidently The People of the State of New York intended by the certificate of the judge to coerce the at-

tendance of O'Neill by one process or the other but preferred to have the witness taken into custody. When the circuit judge in Dade County entertained the certificate, two courses were available. He could have notified the prospective witness of a hearing to determine whether or not the witness should be subpoenaed to testify before the grand jury in New York. On the other hand, in view of the recommendation that the witness be taken into custody, the judge could have directed that the witness be immediately brought before him and then, if the judge was "satified of the desirability" that the witness should be placed in custody and delivered to an officer of the State of New York, he could have followed that procedure instead of issuing a subpoena.

The latter course seems to have been first chosen by the circuit judge, but upon hearing he decided not to put O'Neill in custody or place him under summons because of his conviction that the whole act was invalid.

In the circumstances it seems to be our obligation to decide the constitutionality of Sec. 942.02, supra, whether the procedure be to seize and deliver a witness or to place him under subpoena. We will discuss the two aspects in that order.

Certain salient facts should be remembered in judging the merits of the act as it would operate on O'Neill. He is not charged with crime. On the contrary, it is stated in the judge's certificate that the laws of New York would guarantee O'Neill, if taken there pursuant to this proceeding, protection from arrest and the service of criminal process. Parenthetically, this assurance was given in the certificate but it is extremely doubtful if

the act itself provides for such a safeguard, except in the case where a summons is issued as distinguished from seizure and delivery of the witness.

Although the uniform law was adopted by The National Conference of Commissioners on Uniform State Laws more than a quarter century ago and, incidentally, enacted by this State in 1941, there is a dearth of judicial decision on its operation and validity.

It appears from the opnion of the circuit judge and the brief filed by the appellee that but one court has passed directly upon the provisions of the act attempting to authorize the summary procedure, namely, a District and County Court of Pennsylvania in In Re Allen, 49 Pa.Dist. & Co.R. 631. The court seems to have primarily considered the title of the act under attack, but it did declare the provisions for seizure of a witness and his delivery to the officer of a foreign state invalid because they violated Sec. 2 of Art. IV and the privileges and immunities provision of the Fourteenth Amendment of the Federal Constitution. The Constitutionality of the uniform act was considered in In Re Cooper, 127, N.J.L. 312, 22 A.2d 532, and in In Re Saperstein, 30 N.J.Super. 373, 104 A.2d 842, but in neither of these was the validity of the particular provisions for seizure and delivery of a witness specifically determined. In the former it was contended that the title of the act was not sufficient to make a witness for a defendant subject to its provisions with reference to the issuance of subpoenas. It is true that the provisions for seizure of a witness were assailed but clearly no attempt to invoke them had been made. In the latter decision the points presented were not the same as those we are considering.

[3] By the Fourteenth Amendment of the Constitution of the United States the states are enjoined from making or enforcing "any law which shall abridge the privileges or immunities of citizens of the United States * * *." It also contains the guarantee that a state shall not deprive a person of liberty "without due process of law." And in the first paragraph of Sec. 2 of Art. IV of the Constitution is incoporated the guarantee that also seems immediately involved in the question whether or not a person who is not charged with crime of any sort may be restrained of his freedom because he is needed elsewhere as a witness in an investigation by a grand jury. Not only are the privileges and immunities of citizens of the United States placed beyond the power of the state to impair but citizens of each state are vouchsafed the privileges and immunities of the citizens of all the states. The following paragraph of Sec. 2 of Art. IV gives emphasis to the preceding one and forms an exception to it for such privileges and immunities are not guaranteed to the person charged with "Treason, Felony, or other Crime" who flees from justice. The state to which he flees must deliver him up "on Demand of the executive Authority of the State from which he fled * * *."

We agree with the circuit judge that the right of O'Neill to ingress and egress would be impaired if not destroyed if the circuit judge were to order his seizure, as was 'recommended'. He would no longer have been allowed freely to pass from the State of Florida to another state but would have been taken to New York whether or not he wished to go there and he would have been prevented from returning to his home state of Illinois although it is quite clear that he came to this state for a visit of but a few days to attend a convention.

[4] We think the provisions of the Fourteenth Amendment forbade the passage by the legislature of Florida of a law which would so interfere with the movement of a citizen of the United States who as a citizen of Illinois was privleged to move freely from his state to Florida and back. This privilege would have been nullified, of course, had he become a fugitive from justice which is not the case.

In Twining v. State of New Jersey, 211 U.S. 78, 29 S.Ct. 14, 18, 53 L.Ed. 97, it was written: "Privileges and immunities of citizens of the United States, on the other hand, are only such as arise out of the nature and essential character of the national government, or are specifically granted or secured to all citizens or persons by the Constitution of the United States. Slaughter-House Cases, supra, [16 Wall. 36], at page 79 [21 L.Ed. 394]; Re Kemmler, 136, U.S. 436, 448, 10 S.Ct. 930, 34 L.Ed. 519, 524; Duncan v. State of Missouri, 152 U.S. 377, 382, 14 S.Ct. 570, 38 L.Ed. 485, 487. Thus, among the rights and privileges of national citizenship recognized by this court are the right to pass freely from state to state (Crandall v. State of Nevada, 6 Wall. 35, 18 L.Ed. 745); * * *."

We think that operation of the statute in question would constitute a definite interference with the right of a citizen of the state and of the United States to move freely from one state to another, and we think of no better illustration than what would have occurred in this case had the circuit judge accepted the 'recommendation' and found it 'desirable' to send O'Neill to New York in custody. A Citizen of Illinois, comes to Florida for a brief visit; he is haled into court and confronted with an order placing him in custody of an officer who

will conduct him to New York. His privilege of staying, or returning to his home in Illinois, or of going elsewhere, is brought to an end. It is difficult to imagine a harsher infringement of the right a citizen has to go from place to place which is a privilege, according to the expressions of the Supreme Court of the United States, secured to him under the Fourteenth Amendment.

[5] O'Neill is entitled under Sec. 2 of Art. IV, supra, to all the privileges and immunities of all the citizens of all the other states so long as he has not committed crime for which he could be extradited. The power to remove him in this isolated situation is found in that section. The courts have held that this kind of extradition depends on the Constitution of the United States, People ex rel. Corkran v. Hyatt, 172 N.Y. 176, 64 N.E. 825, 60 L.R.A. 774, and not on comity, courtesy or contract. Ex parte Thompson, 85 N.J.Eq. 221, 96 A. 102.

We think the matter is purely one of conflict with the Federal Constitution; that the act violates the constitution, and consequently cannot be upheld.

Inasmuch as the circuit judge apparently could have put the witness under subpoena if he concluded against the "desirability" of placing him in custody and could have bound the witness to appear, or be held in contempt, and since the judge held the whole act unconsitutional and discharged O'Neill, we decide, too, the question of the validity of the law as it would be applied in the other instance.

[6] It was the view of the circuit judge that the courts of this state were without power to issue process effective beyond the borders of the state. This general

rule we understand is true. Passett v. Chase, 91 Fla. 522, 107 So. 689. Nor can civil process operate beyond the limits of the state so as to form a basis for a money judgment against one residing without although he has been made a party to the litigation by constructive service. Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565.

Because we believe, after careful study, that this feature of the law is unconstitutional, for the reasons we have given, we find no occasion to discuss the question whether or not it violates Secs. 9 and 12 of the Declaration of Rights of the Constitution of Florida, F.S.A. and the Eighth and Fourteenth Amendments of the Constitution of the United States because no bail is provided for persons attached and delivered into custody of an officer of another state.

[7] We ask the rhetorical question: How, then can a Florida court enforce an order to appear before a court of another state when the operation of the order clearly extends beyond state limits? While any person is within the boundaries of this state he is subject to orders entered against him by courts properly exercising their jurisdiction, but it would be inconsistent with the decisions cited to hold that such a court could command a witness to appear in New York, send him on his way, then, if the witness did not appear in New York, punish him here for his failure there "in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state." It is not clear just what court would administer the punishment in the event of default because that part of the act provides that "he shall be punished" in the manner described. Conceivably his failure would be contemptuous

of both courts. If the Florida court attempted to inflict punishment, it would be for failure to comply in New York; if the New York court undertook to inflict punishment, it would be for failure to obey a summons set in motion in Florida. Either way the Florida process would be operating extra-territorially.

The Attorney General concedes in his brief that the Supreme Court of the United States has held that among the privileges of American citizenship guaranteed by the Fourteenth Amendment is the right to pass freely from state to state, citing Twining v. New Jersey, supra. He takes the position that Sec. 2 of Art. IV has no application to the facts of this case because, as we understand it, the statute, Sec. 942.02, does not discriminate between the citizens of Florida and the citizens of any other state. This would mean that O'Neill, a sojourner from Illinois, could be summarily put in custody or placed under subpoena, because any citizen of Florida could be treated the same way. To extend this argument the law would be valid because in those states that have adopted it any person could be placed in custody or put under subpoena, to coerce his appearance as a witness in any other state that had adopted the law.

This might be an answer to a charge of discrimination but it does not follow that if a law is invalid for some reason it should nevertheless be held good because, bad as it is, it affects all persons the same.

As we interpret the Fourteenth Amendment, the citizens of Florida and New York which have adopted the uniform law, may, as citizens of the United States, go where they please, and so may the citizens of Illinois

and other states that have not enacted it. If, aside from the question now of discrimination, a citizen of a state having no such law, Illinois, travels to a state having it, Florida, and there is made subject to the law because another state, New York, thinks his presence there is 'desirable', it cannot be true that the right of all the citizens of all the states to move among them has not been impaired.

The Attorney General quotes liberally from the opinion in Commonwealth of Massachusetts v. Klaus, 145 App. Div. 798, 130 N.Y.S. 713, 717, decided by the Appellate Division of the Supreme Court of New York, and italicizes a statement in the opinion of that court that it was conceded in the brief "that the right of free ingress and egress was never intended to enable a citizen of the United States to interfere with the orderly administration of justice within the territorial boundaries of the state" and that a citizen when "within the boundaries of a state" is amenable to the constitution and laws of that state and that the privileges and immunities clause affords him only protection against unjust discrimination. This concession, said the court, was a complete answer to the charge that a law, similar to the one before us, was unconstitutional. So this decision helps us little.

We are not able so easily to decide the matter before us for we do not think that Sec. 2 of Art. IV read with the pertinent part of the Fourteenth Amendment justifies the view that no rights are abridged if no discrimination is practiced.

The Attorney General argues that "[n]o power was delegated * * * to the United States to require free in-

gress and egress when to do so would defeat one of the primary purposes for which the state governments were instituted, viz., the protection of the people from **criminals.**" (emphasis ours.) Nor does the Constitution prohibit the states from impairing the right of free ingress and egress to the extent required to protect themselves against **criminals.**

We do not find in the provisions of the law a basis for the position. The act refers to prosecutions and grand jury investigations but we have ascertained nothing in it with reference to restricting such testimony to use by the state in either. The procedure is inaugurated by a certificate of a judge of record of the requesting state that the person sought to be extradited "is a material witness in such prosecution, or * * * investigation." We have supplied the emphasis. Furthermore, the preceding section, Sec. 942.01, Florida Statutes 1955, F.S.A., titled "Definitions" contains the following: " 'Witness'—as used in this chapter [942], shall include a person whose testimony is desired in any proceeding or investigation by a grand jury or in a criminal action, prosecution or proceeding held by the prosecution **or the defense.**" (Emphasis ours.) So, evidently the procedure would be available to a defendant as well as the prosecution.

[8] We realize that the right of ingress and egress is not absolute, for instance, the Fourteenth Amendment does not limit exercise by the state of the police power to protect the health, morals and general welfare of the people. Butchers' Union S. H. and L. S. L. Co. v. Crescent City L. S. L. and S. H. Co., 111 U.S. 746, 4 S.Ct. 652, 28 L. Ed. 585. But we do not discern in the present state of facts any of the elements of an exception.

The Attorney General concedes that circumstances might exist under which bodily delivery of a witness would be unreasonable and that "it was never intended to authorize the delivery of a witness * * * where the circumstances are such that it would be unreasonable to do so * * *." This statement is followed by the remark: "when the statute is thusly construed there is nothing unreasonable about it." In this connection we refer, again, to the procedure. If the judge of the demanding state certifies the 'desirability' of bodily delivery, it shall be prima facie evidence of the 'desirability' and the judge here may, if satisfied with the 'desirability', have the witness taken into custody. We cannot decide the constitutionality or unconstitutionality of the act under attack by simply saying that if the circumstances are reasonable there is nothing unreasonable about the act.

After a careful study of both features of the law, we are convinced that it is unconstitutional and that the circuit judge ruled correctly when he held it so.

Affirmed.

TERRELL, C. J., and HOBSON, THORNAL and O'CONNELL, JJ., concur.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. ~~939~~ 53

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,

v.

JOSEPH C. O'NEILL,
Respondent.

On Writ Of Certiorari To The Supreme Court Of Florida

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

THE NATIONAL CONFERENCE OF
COMMISSIONERS ON UNIFORM STATE LAWS

By JAMES C. DEZENDORF
President

Pacific Building
Portland 4, Oregon

LOUIS A. KOHN
Counsel

231 South LaSalle Street
Chicago 4, Illinois

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The National Conference of Commissioners on Uniform State Laws respectfully moves for leave to file a brief as *amicus curiae* in this case. The Conference membership consists of the Commissioners who are appointed by the executive authority in the several states. The purpose of the Conference is to bring about uniformity of state laws. To accomplish this purpose, the Conference drafts and approves acts which are recommended for adoption in all of the states.

The consent of the attorney for the petitioner to file a brief has been obtained. The consent of the attorney for the respondent has been requested but it has not been granted.

The interest of the National Conference of Commissioners on Uniform State Laws arises from the fact that in this case the Supreme Court of Florida has held unconstitutional under the privileges and immunities clauses of Article IV, Section 2, and of the Fourteenth Amendment of the United States Constitution the "Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings." The Act was drafted and approved by the Conference in 1931, and as amended it was reapproved in 1936. The Act has been adopted and is presently in effect in 42 states and in Puerto Rico. This Act has served a very useful purpose in aiding in the enforcement of the criminal laws of the states in which it has been enacted. The Conference and the individual commissioners have actively urged the enactment of this legislation in all of the states. If the decision of the lower court is sustained, it will make the Act ineffective in all of the states.

The National Conference of Commissioners on Uniform State Laws respectfully prays that it be given permission to file a brief *amicus curiae* in order to present arguments, view points and emphases in this case, which the parties themselves may not present.

THE NATIONAL CONFERENCE OF
COMMISSIONERS ON UNIFORM STATE LAWS

By JAMES C. DEZENDORF
President

Pacific Building
Portland 4, Oregon

LOUIS A. KOHN
Counsel

231 South LaSalle Street
Chicago 4, Illinois

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On Writ of Certiorari to the Supreme Court of Florida.

BRIEF OF ATTORNEY GENERAL OF KANSAS, AMICUS CURIAE,

In Which the Several States Shown on the Appendix Join Through Their Attorneys General.

JOHN ANDERSON, JR.,
Attorney General of Kansas,
Topeka, Kansas.

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Article IV, Section 2, Fourteenth Amendment to the Constitution of the United States	1
Handbook of the Nat'l Conf. of Comr. on Uniform State Laws 1931, p. 122, pp. 417-423	2
Sections 942.01-942.06, Florida Statutes 1955	2

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BRIEF OF ATTORNEY GENERAL OF KANSAS, AMICUS CURIAE,

In Which the Several States Shown on the Appendix Join Through Their Attorneys General.

INTEREST OF THE STATES.

In the present case, the Supreme Court of Florida has held unconstitutional, under the privileges and immunities clauses of Article IV, Section 2 of, and of the Fourteenth Amendment to, the Constitution of the United States, the

"Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings." Sections 942.01-942-06, Florida Statutes 1955. Forty-one other states of the United States and Puerto Rico have adopted statutes substantially identical with the statute of the State of Florida which the Florida Supreme Court held unconstitutional. A list of such states is set forth in Appendix II to this brief. Basically, all of such statutes are modeled upon the Uniform Act to Secure the Attendance of Witnesses From Without the State in Criminal Cases, approved by the National Conference of Commissioners on Uniform State Laws in 1931 (Handbook of the Nat'l Conf. of Comr. on Uniform State Laws 1931, p. 122, pp. 417-423) and revised by the Conference in 1936 (idem, 1936, pp. 333-338).

In our federal system, the states are primarily responsible for the protection of their citizens against criminal activity. Punishment of criminal offenders remains principally the obligation of the state governments. Criminals in their criminal activity, however, do not respect state boundaries. Modern transportation and communication facilities have resulted in multi-state criminal activities becoming common. To deal with the criminals themselves who commit a crime in one state and then flee to another state, proceedings for extradition are available. However, the extradition of an offender may well be nullified and prosecution fail should an essential but uncooperative witness be beyond the boundaries of a state wherein the prosecution must lie. Such difficulty also, of course, arises in cases wherein extradition is not involved.

The prompt and widespread acceptance of the Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings clearly evidences that such act supplied to the states a theretofore unavailable facility for their use in criminal law enforcement. Employment of the procedures provided by the act has been frequent,

particularly in the metropolitan areas which experience the constant ingress and egress of residents and nonresidents. In those areas, especially, the necessity of obtaining the presence of a witness from without the state in order successfully to prosecute for a criminal offense arises repeatedly.

Should this Court sustain the decision of the Supreme Court of Florida, the remaining states which have similar enactments will be deprived of this most useful and essential tool in their enforcement of their criminal laws. Believing that the decision of the Supreme Court of Florida is erroneous, this brief amicus curiae is submitted in support of the position of the People of the State of New York, petitioner in the cause.

ARGUMENT.

On behalf of amicus curiae, it is respectfully submitted to the Court that the brief of the petitioner in this case clearly and forcefully points out the erroneous basis of the decision of the Supreme Court of Florida. Amicus curiae respectfully joins in and supports the brief and argument of the petitioner in this cause and respectfully submits that the decision of the Supreme Court of Florida should, for the reasons set out in the brief of petitioner herein, be reversed.

Respectfully submitted,

JOHN ANDERSON, JR.,
Attorney General of Kansas.

APPENDIX I.

The following states, through their Attorneys General, join in the foregoing Brief of Attorney General of Kansas, Amicus Curiae:

John Patterson
Attorney General
State of Alabama

Bruce Bennett
Attorney General
State of Arkansas

Edmund G. Brown
Attorney General
State of California

Duke W. Dunbar
Attorney General
State of Colorado

John J. Bracken
Attorney General
State of Connecticut

Eugene Cook
Attorney General
State of Georgia

Graydon W. Smith
Attorney General
State of Idaho

Edwin K. Steers
Attorney General
State of Indiana

Norman A. Erbe
Attorney General
State of Iowa

Jo M. Ferguson
Attorney General
State of Kentucky

Jack P. F. Gremillion
Attorney General
State of Louisiana

Frank F. Harding
Attorney General
State of Maine

C. Ferdinand Sybert
Attorney General
State of Maryland

Miles Lord
Attorney General
State of Minnesota

Joe T. Patterson
Attorney General
State of Mississippi

John M. Dalton
Attorney General
State of Missouri

Forrest H. Anderson
Attorney General
State of Montana

Clarence S. Beck
Attorney General
State of Nebraska

Harvey Dickerson
Attorney General
State of Nevada

J. Joseph Nugent
Attorney General
State of Rhode Island

Louis C. Wyman
Attorney General
State of New Hampshire

T. C. Callison
Attorney General
State of South Carolina

David D. Furman
Attorney General
State of New Jersey

George F. McCanless
Attorney General
State of Tennessee

Fred M. Standley
Attorney General
State of New Mexico

Will Wilson
Attorney General
State of Texas

Louis J. Lefkowitz
Attorney General
State of New York

E. Richard Callister
Attorney General
State of Utah

Malcolm B. Seawell
Attorney General
State of North Carolina

Frederick M. Reed
Attorney General
State of Vermont

Leslie R. Burgum
Attorney General
State of North Dakota

Albertis S. Harrison, Jr.
Attorney General
State of Virginia

William Saxbe
Attorney General
State of Ohio

John J. O'Connell
Attorney General
State of Washington

Mac Q. Williamson
Attorney General
State of Oklahoma

W. W. Barron
Attorney General
State of West Virginia

Robert Y. Thornton
Attorney General
State of Oregon

Thomas O. Miller
Attorney General
State of Wyoming

Francisco Espinosa, Jr.
Acting Attorney General
Commonwealth of Puerto Rico

APPENDIX II.

Table of states wherein Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings has been adopted.

State	Citation of Act
Arizona	A. R. S., §§ 13-1861 to 13-1866.
Arkansas	Ark. Stat., §§ 43-2005 to 43-2009.
California	West's Ann. Pen. Code, §§ 1334-1334.6.
Colorado	C. R. S. '53, 39-6-1 to 39-6-6.
Connecticut	Gen. St. 1949, § 8732.
Delaware	11 Del. C., §§ 3521-3526.
Florida	F. S. A., §§ 942.01-942.06.
Idaho	I. C., § 19-3005.
Indiana	Burns' Ann. St., §§ 9-1626 to 9-1630.
Kansas	G. S. 1949, 62-2801 to 62-2806.
Kentucky	K. R. S. 421.230-421.270.
Louisiana	L. S. A.-R. S. 15:152.1-15:152.5.
Maine	R. S. 1954, c. 148, §§ 24-28.
Maryland	Code Supp. 1956, Art. 27, §§ 701-707.
Massachusetts	G. L. (Ter. Ed.), c. 233, §§ 13A-13D.
Minnesota	M. S. A., §§ 634.06-634.09.
Mississippi	Code 1942, §§ 1892-1897.
Montana	R. C. M. 1947, §§ 94-9001 to 94-9007.
Nebraska	R. R. S. 1943, §§ 29-1906 to 29-1911.
Nevada	N. R. S., §§ 178.295-178.320.
New Hampshire	R. S. A. 613:1 to 613:6.

State	Citation of Act
New Jersey	N. J. S. A. 2A:81-18 to 2A:81-23.
New Mexico	1953 Comp., §§ 41-12-13 to 41-12-18.
New York	McKinney's Crim. Code, § 618-a.
North Carolina	G. S., §§ 8-65 to 8-70.
North Dakota	N. D. R. C. 1943, 31-0325 to 31-0331.
Ohio	R. C., §§ 2939.05-2939.29.
Oklahoma	22 Okla. St. Ann., §§ 721-727.
Oregon	O. R. S. 139.210-139.260.
Pennsylvania	19 P. S., §§ 622.1-622.7.
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Rhode Island	Gen. Laws 1938, c. 626, §§ 1-7.
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Wyoming	W. C. S. 1945, §§ 10-1207 to 10-1209.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 53

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,

v.

JOSEPH C. O'NEILL,
Respondent.

Brief for Amicus Curiae

THE NATIONAL CONFERENCE OF
COMMISSIONERS ON UNIFORM STATE LAWS

By JAMES C. DEZENDORF
President

Pacific Building
Portland 4, Oregon

LOUIS A. KOHN
Counsel

231 South LaSalle Street
Chicago 4, Illinois

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STATEMENT OF THE CASE.

The statement of the case in the Brief for the Petitioner sets out fully the facts of the case, and *Amicus* adopts that statement.

From the statement two questions are presented in this Court:

1. Does the provision of Section 942.02 of the Florida Statutes 1955, which is Section 2 of the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, which authorizes a Florida court

of record to order that a witness in Florida be taken into custody and delivered to an officer of a requesting state for the purpose of requiring such witness to attend a criminal proceeding or grand jury investigation in the requesting state, where the requesting state has adopted reciprocal legislation, violate the privileges and immunities clause of Article IV, Section 2, of the United States Constitution?

2. Does the Florida statute conflict with the privileges and immunities clause of the Fourteenth Amendment?

The statute requires as a condition precedent to the issuance of an order by the Florida court to take the witness into custody to be delivered to an officer of the requesting state, that the Florida judge find (1) that the witness is material and necessary, (2) that it will not cause undue hardship to the witness to be compelled to attend and testify in the proceeding or grand jury investigation, (3) that the proceeding or grand jury investigation has commenced or is about to commence, and (4) that the requesting state will give the witness protection from arrest and the service of civil and criminal process within the state. The statute further requires the requesting state to tender payment of ten cents a mile for each mile to be traveled and five dollars for each day that the witness is required to travel and attend as a witness. Florida Statutes 1955, Section 942.02. Since the finding of the Florida judge can be made only after notice and hearing at which the prospective witness is represented by counsel, the question becomes solely one of the power of the State of Florida to require an individual who is in Florida to be delivered to an officer of another state for the purpose of giving testimony in the requesting state.

ARGUMENT.

1. Section 942.02 of Florida Statutes 1955, which authorizes a judge in a Florida court of record to order that a witness be taken into custody and delivered to an officer of a requesting state for the purpose of requiring said witness to attend a criminal proceeding or a grand jury investigation in the requesting state when the requesting state has adopted reciprocal legislation, is not unconstitutional as in conflict with the privileges and immunities clause of Article IV, Section 2, of the United States Constitution.

The purpose of the clause which provides that "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States" was to prevent any state from discriminating in favor of its citizens and against citizens of other states. When an individual who is a citizen of State A goes into State B to engage in any business activity, he is entitled to be treated the same as a citizen of State B. As stated by the Court in the *Slaughter-House Cases,* 16 Wall. 36, 77:

> "Its sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction."

There is no different treatment of the Illinois citizen than would apply to a Florida citizen. Equality is the theme of the statute, for all within the jurisdiction of the State of Florida are subject to its terms.

Further, this cause does not purport to confer upon an individual coming into a state any substantive rights other than those enjoyed by the citizens of that state.

"At one time it was thought that this section recognized a group of rights which, according to the jurisprudence of the day, were classed as 'natural rights'; and that the purpose of the section was to create rights of citizens of the United States by guaranteeing the citizens of every State the recognition of this group of rights by every other State. Such was the view of Justice Washington.

"While this description of the civil rights of the citizens of the States has been quoted with approval, it has come to be the settled view that Article IV, § 2, does not import that a citizen of one State carries with him into another fundamental privileges and immunities which come to him necessarily by the mere fact of his citizenship in the State first mentioned, but, on the contrary, that in any State every citizen of any other State is to have the same privileges and immunities which the citizens of that State enjoy. The section, in effect, prevents a State from discriminating against citizens of other States in favor of its own." *Hague* v. *C.I.O.*, 307 U.S. 496, 511.

"The primary purpose of this clause, like the clauses between which it is located—those relating to full faith and credit and to interstate extradition of fugitives from justice—was to help fuse into one Nation a collection of independent, sovereign States." *Toomer* v. *Witsell*, 334 U.S. 385, 395.

It is submitted that the statute involved in this case manifests a recognition by the State of Florida that criminal activity is a national problem.

2. The provision of Section 942.02, Florida Statutes 1955, is not unconstitutional because of a negative implication of the extradition clause of Article IV, Section 2, Clause 2 of the United States Constitution.

"A Person charged in any State with Treason, Felony or other Crime, who shall flee from Justice,

> and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime."

The Florida Supreme Court reasoned that since the Constitution expressly provides for extradition in "Treason, Felony or other Crime," this exception indicates that this may be the only basis for removal of an individual from the state to another state.

It is submitted that such implication should not be drawn from this exception. The framers of the Constitution were making sure that in this important area there would be a method of returning an alleged criminal to the scene of the crime for trial. This constitutional provision restated the practice existing before the adoption of the Constitution, under which criminals were returned to the state of the offense by principles of comity. *Kentucky* v. *Dennison,* 24 How. 66. In this case the Court held that the Governor of Ohio could not be compelled to turn over the fugitive, but that his compliance with the Constitution and the Act of Congress depended on his own fidelity. This express provision of the Constitution is left for its enforcement to principles of comity.

That it is not to preclude the interstate rendition of prisoners other than those within its exact terms is illustrated by the case of *Innes* v. *Tobin,* 240 U.S. 127, in which this Court sustained the power of the state of Texas to surrender to the Georgia authorities one who had not fled to Texas but who had been brought into Texas by extradition from the state of Oregon.

This provision of the Constitution does not prevent a state from using its power to require a witness to attend a criminal proceeding in another state. The principles of comity which form the basis of interstate rendition of

criminals can be extended to include important witnesses in criminal proceedings.

3. The provision of Section 942.02 of Florida Statutes 1955, which authorizes a judge of a Florida court of record to order a witness to be taken into custody and delivered to an officer of the requesting state for the purpose of assuring the witness's attendance at a criminal proceeding or grand jury investigation in a requesting state, where the requesting state has enacted reciprocal legislation, is not unconstitutional because it conflicts with the privileges and immunities clause of the Fourteenth Amendment.

The fundamental privilege or immunity asserted by the Respondent in this case is the right of free ingress or egress between states. *Amicus* concedes that this right is guaranteed to all citizens. The constitutional foundation of the right may be the fact that this is one nation.

> "The people of these United States constitute one nation. They have a government in which all of them are deeply interested. This government has necessarily a capital established by law, where its principal operations are conducted. . . . That government has a right to call to this point any or all of its citizens to aid in its service, as members of the Congress, of the courts, of the executive departments, and to fill all its other offices; and this right cannot be made to depend upon the pleasure of a State over whose territory they must pass to reach the point where these services must be rendered. . . . In all these it demands the services of its citizens, and is entitled to bring them to those points from all quarters of the nation, and no power can exist in a State to obstruct this right that would not enable it to defeat the purposes for which the government was established. . . .
>
> "But if the government has these rights on her own account, the citizen also has correlative rights. He has the right to come to the seat of government to

assert any claim he may have upon that government, or to transact any business he may have with it. To seek its protection, to share its offices, to engage in administering its functions. He has a right to free access to its sea-ports, through which all the operations of foreign trade and commerce are conducted, to the sub-treasuries, the land offices, the revenue offices, and the courts of justice in the several States, and this right is in its nature independent of the will of any State over whose soil he must pass in the exercise of it." *Crandall* v. *Nevada,* 6 Wall. 35, 43, 44.

It is to be noted that emphasis is placed both on the right of the individual to go to the seat of government or to the seaports, and also on the right of the government to request him to go. He can be compelled to travel across state lines to fulfill this obligation as a citizen of his nation.

The constitutional barrier to state power to impede free ingress and egress of citizens may be found in the commerce clause, Article I, Section 8, of the Constitution, *Edwards* v. *California,* 314 U.S. 160, or in the privileges and immunities clause of the Fourteenth Amendment.

> "The right to move freely from State to State is an incident of *national* citizenship protected by the privileges and immunities clause of the Fourteenth Amendment against state interference." *Edwards* v. *California,* 314 U.S. 160, 178 (concurring opinion).

Freedom of movement has been eloquently expounded by Professor Zechariah Chafee in *Three Human Rights in the Constitution,* pp. 162-213.

That this right exists does not lead to the conclusion that it is an absolute, for all rights guaranteed in the Constitution have their limits. Freedom of movement can be restricted by a state to enforce its quarantine laws, to prevent an individual from leaving the state to avoid an

obligation in a law suit through the ancient writ of *ne exeat*, and to require an individual to remain in the state to give testimony in a criminal prosecution in which he is a material witness; in this latter case he may be taken into protective custody prior to trial. One must conclude that reasonable interference with freedom of movement is valid. The question then in the instant case is whether the witness O'Neill would be restricted unreasonably if he was taken into custody in Florida and removed to New York to give testimony in a criminal proceeding or grand jury investigation.

All would agree that the Constitution of the United States has created a nation. The administration of criminal justice in one state affects the fabric of the nation. Recent Congressional investigations have dramatized the interstate character of crime in the United States and the high degree of mobility of criminals and their associates. It is therefore important to the nation that methods be found effectively to eradicate or minimize criminal action without unduly interfering with the right to move freely from state to state. The states must be able to cooperate to enforce their criminal laws.

(a) Freedom from giving testimony in a criminal proceeding is not a privilege or immunity of United States citizenship. The citizen has obligations as well as privileges which attach to his citizenship. A citizen of the United States residing permanently out of the country may be required to return to the United States to testify in a federal court in a criminal proceeding. *Blackmer* v. *United States*, 284 U.S. 421. This is true even though service of process was made outside the jurisdiction of the United States by a member of the consular staff. Although in this situation the United States Court may lack power in the physical sense to return the individual to the country,

it was held to have power to cite the witness for contempt for failure to respond to the subpoena and to attach property in this country to pay the fine levied for the contempt.

If the United States can compel a witness to return to testify, then his freedom of movement is not guaranteed as a privilege or immunity of United States citizenship. On the contrary, his obligation to testify stems from that same citizenship.

It is urged that the states by reciprocal legislation can constitutionally require testimony in a requesting state. In the instant case the witness O'Neill was served with process in Florida and was brought before the Florida court so that the jurisdiction was founded on physical presence. To issue the requested order is not to act extra-territorially. The Florida order acts only on the witness in Florida.

(b) The Congress has recognized the need to aid the states in returning alleged criminals or witnesses who leave the state, by passing the Fleeing Felon and Witness Act, Section 1073, Title 18, U.S. Code. In this act the Congress has made it a crime for a witness to leave a state to avoid prosecution or custody or confinement for a crime therein, or to avoid giving testimony in any criminal proceedings in the state if a felony is charged. It is significant that the venue for the federal crime is laid in the federal judicial district in which the original crime was alleged to have been committed. The Congress has thus used the commerce power "to aid the states in the apprehension of the guilty and make certain, swift, and sure the punishment of those who commit crimes against the states." *United States* v. *Miller,* 17 F. Supp. 65, 68. The constitutionality of this act was sustained in a case in which a witness was subpoenaed to appear before a one-man grand jury. *Hemans* v. *United States,* 163 F. 2d 228.

If the Congress can constitutionally create a crime under the commerce clause for the purpose of returning an alleged felon or a witness in a criminal proceeding to the state where the original crime was committed, there should be no constitutional barrier to reciprocal action by the several states on principles of comity which would accomplish the same result. This is a reasonable interference with the right of free movement between the states.

(c) Assuming that the state may have the power to require a witness to go into another state to give testimony in the criminal proceedings, the Florida Act, Sections 942.01-942.06, Florida Statutes 1955, which is the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, is a reasonable method of exercising the power. In the first place the Court may issue the order only after adequate notice has been given the witness within the state of Florida and a hearing has been held. At all times the witness is entitled to counsel. At the hearing the judge must determine (1) that the witness is material and necessary, (2) that it will not cause undue hardship to the witness to be compelled to attend and testify in the requesting state, (3) that the proceeding has begun or is about to begin, and (4) that he will be given immunity from the service of civil and criminal process while in the requesting state. Further, the requesting state must pay or tender to the witness in advance the transportation costs and witness fees. It is to be noted that there must be an affirmative finding of fact that the attendance *will not cause undue hardship to the witness.*

If the judge finds it will not cause undue hardship to the witness to attend, and if the proceeding is about to begin, it is reasonable to take the witness into custody to be delivered to an officer of the requesting state.

(d) The privileges and immunities clause of the Fourteenth Amendment has had an unusual history. A diligent search of the cases arising under the clause revealed only one in which this Court held state action unconstitutional. In the case of *Colgate* v. *Harvey*, 296 U.S. 404, a Vermont income tax was invalidated because it taxed income from money loaned outside the state and exempted income from loans made within the state. This was held to violate the privileges and immunities clause, as well as the equal protection clause, of the Fourteenth Amendment. Mr. Justice Stone, dissenting in the case, wrote as follows:

> "In no case since the adoption of the Fourteenth Amendment has the privileges and immunities clause been held to afford any protection to movements of persons across state lines or other form of interstate transaction.
>
> "The reason for this reluctance to enlarge the scope of the clause has been well understood since the decision of the *Slaughter-House Cases, supra.* If its restraint upon state action were extended more than is needful to protect relationships between the citizen and the national government, and it did more than duplicate the protection of liberty and property secured to persons and citizens by the other provisions of the Constitution, it would enlarge judicial control of state action and multiply restrictions upon it to an extent difficult to define, but sufficient to cause serious apprehension for the rightful independence of local government. That was the issue fought out in the *Slaughter-House Cases, supra,* with the decision against the enlargement. Since the adoption of the Fourteenth Amendment at least forty-four cases have been brought to this Court in which state statutes have been assailed as infringements of the privileges and immunities clause. Until today none has held that state legislation infringed that clause." *Colgate* v. *Harvey,* 296 U.S. 404, 445-446.

Justice Stone's view was supported by a majority of the Court four years later in *Madden* v. *Kentucky*, 309 U.S. 83, 93, in this language:

> "Appellant relies upon *Colgate* v. *Harvey* as a precedent to support his argument that the present statute is not within the limits of permissible classification and violates the privileges and immunities clause. In view of our conclusions, we look upon the decision in that case as repugnant to the line of reasoning adopted here. As a consequence, *Colgate* v. *Harvey* must be and is overruled."

Although two justices relied on the privileges and immunities clause of the Fourteenth Amendment to decide *Hague* v. *C.I.O.*, 307 U.S. 496, and the concurring judges in *Edwards* v. *California*, 314 U.S. 160, preferred to place the decision in that case on the clause, the results in those two cases were reached by reference to other clauses in the Constitution. The fact that only one state act has been invalidated by reference to the clause and that case has been expressly overruled leads to the conclusion that the clause states in broad language constitutional rights specifically protected by other provisions of the United States Constitution.

The clause does not invalidate the statute in this case which requires a witness to testify in a criminal proceeding in another state.

CONCLUSION.

1. Section 942.02 of Florida Statutes 1955 is not unconstitutional under the privileges and immunities clause of Article IV, Section 2.

2. The Act is not invalidated by the negative implications of the extradition clause of the same section.

3. The Act does not deprive the witness O'Neill of a privilege or immunity guaranteed to United States citizens by the Fourteenth Amendment.

We therefore respectfully request that the judgment of the Florida court be reversed and the cause be remanded for further proceedings.

Respectfully submitted,

THE NATIONAL CONFERENCE OF
COMMISSIONERS ON UNIFORM STATE LAWS

By JAMES C. DEZENDORF
President

Pacific Building
Portland 4, Oregon

LOUIS A. KOHN
Counsel

231 South LaSalle Street
Chicago 4, Illinois